Maxi Development Sdn Bhd & Ors v Allianz General Insurance Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — D2–22–1372 OF 2005
AMELIA TEE ABDULLAH JC
18 JUNE 2010

Insurance — Fire insurance — Subsidence and landslip endorsement, master policy contained — Units of apartment buildings affected during landslides — Whether claim fell within peril stipulated in policy — Whether second to fifth plaintiffs individual owners covered by master policy — Whether demolition and rebuilding order by Town Council effective — Whether defendant's decision to repair affected units illegal and contrary to law — Whether defendant entitled to elect to reinstate affected units instead of paying amount of loss when there was effective demolition order — Whether plaintiffs had right to demand disclosure or interfere in repair works — Whether plaintiffs entitled to special and general damages as claimed

Maxi Development Sdn Bhd ('the first plaintiff') was at all material times the developer and registered owner of the project land, which consisted of three blocks of four storey apartment buildings known as the Casa Vinca Apartments ('the property'), and the legal and beneficial owners of four apartment units in the property, while the second to fifth plaintiffs were at all material times the legal and beneficial owners of various units in the property. The plaintiffs' property, including the outbuilding, retaining wall and fencing but excluding the foundation, was insured with Allianz General Insurance Malaysia Bhd ('the defendant') under a master fire insurance policy ('the master policy') for a sum of RM7m from 8 July 2003 to 7 July 2004. The master policy included, inter alia, a subsidence and landslip endorsement for coverage for damage caused to the property by 'subsidence and landslip' for the period of cover. According to cl 16A of the master policy, if the property insured was destroyed or damaged, the amount payable was to be calculated based on the cost of replacing or reinstating on the same site, property of the same type. The plaintiffs' apartment units were damaged ('the affected units') during landslides that occurred on 19 September 2003 and 6 October 2003 ('the landslides'). It was the plaintiffs' claim that the damage caused to the affected units, which included the damage to the retaining wall, was covered under the master policy issued by the defendant. When the plaintiffs claimed for reinstatement of the insured property that was damaged by the landslide, the defendant appointed its loss adjusters to conduct investigations. On 23 December 2003, the first plaintiff received a letter from Majlis Perbandaran Langkawi ('MPL') to demolish and rebuild the affected units ('the demolition order'). However, the consultant engineer appointed by the defendant's loss adjusters ('the

defendant's consulting engineer') advised the defendant that the option of demolishing and then reconstructing the building was a not a viable option. It was instead his opinion that the damage to the affected units could be repaired with the buildings restored to their condition before the damage. His proposals were accepted by the adjusters and the defendant was advised accordingly. On 18 December 2004 a meeting was held between the first plaintiff, MPL, their respective consulting engineers and the defendant's loss adjusters to discuss the proposal to carry out repairs to the affected units without demolishing them. The minutes of the meeting showed that MPL's engineer was of the view that it was not safe to rectify the affected units without demolishing them first but the defendant had allegedly suggested that the affected units be reinstated without being demolished. The first plaintiff claimed that as a result of the defendant's insistence on repairing the affected units without demolition, it reluctantly agreed with the suggestion to repair but subject to some 14 conditions. After the defendant commenced its repair works on the affected units, the first plaintiff discovered that the rectification works were not properly carried out. It was also the plaintiffs' complaint that the defendant had failed to disclose any information in respect of the rectification works even when requested repeatedly by them. Thus, when the plaintiffs received a letter from the defendant informing them that the repair works on the affected units had been completed and enclosing a certificate of practical completion, they sought confirmation from MPL. MPL's response was that the demolition order was still in force as it had never been withdrawn and that it had never issued any approval that the affected units were fit for occupation because it had never received an application for approval of rectification works. This was the plaintiffs' claim against the defendant for damages suffered as a result of the defendant's breach of the master policy, by failing to rectify the damage to the affected units. The defendant disputed the plaintiffs' claim and denied that the plaintiffs were entitled to any of the remedies sought. The defendant claimed that the second to fifth plaintiffs were not covered by the master policy because the master policy was issued to cover the project but that individual policies were issued after the units were sold to individual buyers. As such the defendant submitted that the individual owners had to sue under their own policies. The plaintiffs submitted that where repair works were being carried out on the affected units the defendant's consultant engineer would have to apply for and obtain planning approval from MPL under s 83(3) of the Street Drainage and Building Act 1974 ('SDBA') but the defendant had failed to comply with this requirement. Neither were plans or specifications showing the intended repairs as required under s 83(4) of the SDBA submitted for MPL's approval. The defendant replied that its consulting engineer had attempted to comply with s 83(1), (3) and (4) of the SDBA. The plaintiffs claimed special damages of RM1,647,921.20, general damages to be assessed, interest and costs.

Held, allowing the plaintiffs' claim with costs:

(1) Although individual policies were issued to individual buyers, there was

no separate assignment of amounts of coverage and the perils covered under the individual policies were the same as that in the master policy. Unlike in the case of landed property, insurance policies for strata owners are linked to the master policy even after individual policies were issued. As such the claim of the plaintiffs under the master policy was acceptable (see paras 115–117).

(2) From the minutes of the meeting on 18 February 2004, between the first plaintiff, the defendant's loss adjuster, MPL and their respective engineers it was clear that there was no retraction or revocation of the demolition order on that date. Neither was there an agreement between the parties from which the defendant could presume nor infer that there was such a revocation or retraction of the demolition order. Further it was found that the clear provisions of s 83(1), (3) and (4) of the SDBA were applicable in the instant case. MPL in exercise of their powers under the SDBA was satisfied that the affected units were in a dangerous condition and hence issued the demolition order. As such, once the demolition order was issued and not revoked there should be strict compliance with its provisions to ensure the safety of the occupants as well as the public. It was found that the defendant's attempts to comply did not equate with compliance. The defendant was guilty of non-compliance with the relevant laws and by-laws and by its non-compliance was in breach of the conditions attached to repair the affected units. As such, looking at the totality of the evidence adduced, the court found that the plaintiff had succeeded in proving on a balance of probabilities that the affected units were damaged during the landslides and that the defendant and its engineers and contractors were under a duty to comply strictly with the provisions of the SDBA but failed (see paras 126–129, 142, 152–153 & 160–161).

(3) By virtue of cl 16 of the master policy the defendant was entitled to elect to reinstate the damaged property instead of paying the amount of the loss or damage. However, with the demolition order in force the defendant's right to election became conditional. At the same time MPL could not claim it was unaware of the reinstatement works that were being carried out by the defendant. By their silence and inaction MPL may have given an impression that the reinstatement works were in fact being approved or condoned. In the light of the evidence adduced as to the circumstances then prevailing at the material time, the court was prepared to accept that there was some form of informal stay of the demolition order. Nevertheless, the existence of the demolition order, albeit 'suspended', imposed an even greater obligation on the defendant to strictly comply with the law enacted to cover such a situation of failure of building (see paras 133–134, 143 & 162).

(4) A reading of cl 16 of the master policy showed that there was no legal requirement to provide the plaintiffs with such information and particulars as to the nature and quality of their repair work that was being undertaken. Thus the defendant was not in breach by refusing to provide the documentation requested for by the first plaintiff (see paras 149–150).

(5) The defendant's argument for an allowance for betterment did not arise in the light of the fact that the repair work was carried out contrary to the agreement between the parties and in non-compliance with applicable laws (see para 167).

(6) The sum of RM1,386,200 quoted by the plaintiffs as the costs for demolishing and reinstating the affected units was accepted since the defendant had chosen not to dispute the quotation or to cross-examine on it. The plaintiffs had succeeded in proving a sum of RM1,386,200 out of the RM1,547,400 claimed for reinstatement of costs. The claim for RM75,521.25 for clearing the debris and the claim for RM25,000 for professional costs had not been proved. The plaintiffs were thus awarded the sum of RM1,386,200 for special damages, interest at the rate of 8%pa from the date of filing the suit until full settlement and costs (see paras 173–176).

[Bahasa Malaysia summary

Maxi Development Sdn Bhd ('plaintif pertama') pada semua masa material merupakan pemaju dan pemilik berdaftar projek tanah, yang merangkumi tiga blok bangunan pangsapuri empat tingkat yang dikenali sebagai Casa Vinca Apartments ('hartanah tersebut'), dan pemilik sah dan benefisial empat unit pangsapuri di dalam hartanah tersebut, sementara plaintif-plaintif kedua hingga kelima adalah pada semua masa material pemilik-pemilik sah dan benefisial beberapa unit di dalam hartanah tersebut. Hartanah plaintif-plaintif, termasuk binaan luaran, dinding penahan dan pagar dengan pengecualian asas, telah diinsuranskan dengan Allianz General Insurance Malaysia Bhd ('defendan') di bawah polisi induk insurans kebakaran ('polisi induk') untuk jumlah sebanyak RM7 juta dari 8 Julai 2003 hingga 7 Julai 2004. Polisi induk termasuk, antara lain, endorsan penenggelaman dan gelinciran tanah untuk perlindungan bagi kerosakan yang diakibatkan kepada hartanah tersebut oleh 'subsidence and landslip' untuk tempoh perlindungan. Menurut klausa 16A polisi induk, jika hartanah yang diinsuranskan telah dimusnahkan atau mengalami kerosakan, jumlah yang perlu dibayar adalah dikira berdasarkan kepada kos penggantian atau mengembalikan semula ke atas tempat yang sama, hartanah yang sama jenisnya. Unit pangsapuri plaintif-plaintif mengalami kerosakan ('unit-unit yang terjejas') semasa tanah runtuh yang berlaku pada 19 September 2003 dan 6 Oktober 2003 ('tanah runtuh tersebut'). Adalah tuntutan plaintif-plaintif bahawa kerosakan yang diakibatkan kepada unit-unit yang terjejas, yang termasuk kerosakan kepada

dinding penahan, dilindungi di bawah polisi induk yang dikeluarkan oleh defendan. Apabila plaintif-plaintif menuntut pengembalian hartanah yang diinsuranskan tersebut yang mengalami kerosakan akibat daripada tanah runtuh tersebut, defendan melantik pelaras kerugian untuk melakukan siasatan. Pada 23 Disember 2003, plaintif pertama menerima surat daripada Majlis Perbandaran Langkawi ('MPL') untuk merobohkan dan membina semula unit-unit yang terjejas ('perintah perobohan'). Walau bagaimanapun, jurutera perunding yang dilantik oleh pelaras kerugian defendan ('jurutera perunding defendan') menasihatkan defendan bahawa pilihan perobohan dan kemudiannya membina semula bangunan bukan satu pilihan yang berdaya maju. Sebaliknya dia berpendapat bahawa kerosakan kepada unit-unit yang terjejas boleh dibaiki dengan bangunan-bangunan tersebut dikembalikan kepada keadaan sebelum kerosakan. Cadangannya diterima oleh pelaras dan defendan dinasihatkan sewajarnya. Pada 18 Disember 2004 satu perjumpaan diadakan di antara plaintif pertama, MPL, jurutera perunding masing-masing dan pelaras kerugian defendan untuk membincangkan cadangan untuk membaiki unit-unit yang terjejas tanpa merobohkannya. Minit mesyuarat menunjukkan bahawa jurutera MPL berpendapat bahawa ia tidak selamat untuk membaiki unit-unit yang terjejas tanpa merobohkannya dahulu tetapi defendan didakwa mencadangkan bahawa unit-unit yang terjejas tersebut dipulihkan tanpa dirobohkan. Plaintif pertama menuntut bahawa akibat daripada desakan defendan untuk membaiki unit-unit yang terjejas tanpa perobohan, ia dengan keberatan bersetuju terhadap cadangan untuk membaiki tetapi tertakluk kepada 14 syarat. Selepas defendan memulakan kerja-kerja pembaikan ke atas unit-unit yang terjejas, plaintif pertama mendapati bahawa kerja-kerja membaiki tidak dijalankan dengan sewajarnya. Ia juga adalah aduan plaintif-plaintif bahawa defendan telah gagal mendedahkan apa-apa maklumat berkaitan dengan kerja-kerja membaiki walaupun selepas diminta berkali-kali oleh mereka. Oleh itu, apabila plaintif-plaintif menerima surat daripada defendan memberitahu mereka bahawa kerja-kerja pembaikan ke atas unit-unit yang terjejas telah diselesaikan dan melampirkan sijil penyelesaian praktikal, mereka memohon pengesahan daripada MPL. Jawapan MPL adalah bahawa perintah perobohan masih berkuat kuasa kerana ia tidak pernah ditarik balik dan bahawa ia tidak pernah memberikan kelulusan bahawa unit-unit yang terjejas tersebut sesuai untuk diduduki kerana ia tidak pernah menerima permohonan untuk kelulusan kerja-kerja pembaikan. Ini adalah tuntutan plaintif-plaintif terhadap defendan bagi kerugian yang dialami akibat daripada kemungkiran polisi induk oleh defendan, dengan kegagalan untuk membaiki kerosakan kepada unit-unit yang terjejas. Defendan mempertikaikan tuntutan plaintif-plaintif dan menafikan bahawa plaintif-plaintif berhak kepada apa-apa remedi yang dipohon. Defendan menyatakan bahawa plaintif-plaintif kedua hingga kelima tidak dilindungi oleh polisi induk kerana polisi induk tersebut dikeluarkan untuk melindungi projek tersebut tetapi polisi-polisi individu dikeluarkan selepas unit-unit tersebut dijual kepada pembeli-pembeli perseorangan. Oleh demikian defendan menghujah bahawa pemilik

persendirian perlu menyaman di bawah polisi mereka sendiri. Plaintif-plaintif menghujah bahawa di mana kerja-kerja pembaikan dijalankan ke atas unit-unit yang terjejas jurutera perunding defendan perlu memohon dan mendapatkan kelulusan pelan daripada MPL di bawah s 83(3) Akta Jalan, Parit dan Bangunan 1974 ('AJPB') tetapi defendan telah gagal untuk mematuhi keperluan ini. Juga tidak ada pelan dan spesifikasi yang menunjukkan pembaikan yang diniatkan di bawah s 83(4) AJPB dikemukakan untuk kelulusan MPL. Defendan menjawab bahawa jurutera perundingnya telah mencuba untuk mematuhi s 83(1), (3) dan (4) AJPB. Plaintif-plaintif menuntut kerugian khas berjumlah RM1,647,921.20, ganti rugi am dinilai, faedah serta kos.

Diputuskan, membenarkan tuntutan plaintif-plaintif dengan kos:

(1) Walaupun polisi-polisi berasingan dikeluarkan kepada pembeli-pembeli perseorangan, tidak ada peletakhakkan jumlah perlindungan dan bahaya yang dilindungi di bawah polisi-polisi individu adalah sama seperti polisi induk. Tidak seperti kes di dalam harta bertanah, polisi insurans untuk pemilik strata dikaitkan kepada polisi induk walaupun selepas polisi berasingan dikeluarkan. Oleh itu tuntutan plaintif-plaintif di bawah polisi induk adalah boleh diterima (lihat perenggan 115–117).

(2) Daripada minit mesyuarat pada 18 Februari 2004, di antara plaintif pertama, pelaras kerugian defendan, MPL dan jurutera masing-masing adalah jelas bahawa tidak ada penarikan balik atau pembatalan perintah perobohan pada tarikh tersebut. Juga tidak ada perjanjian di antara pihak-pihak daripada mana defendan boleh menganggap atau membuat inferens bahawa terdapat pembatalan atau penarikan balik perintah perobohan. Selanjutnya didapati bahawa peruntukan jelas s 83(1), (3) dan (4) AJPB adalah beraplikasi di dalam kes ini. MPL dalam pelaksanaan kuasa mereka di bawah AJPB berpuas hati bahawa unit-unit yang terjejas adalah dalam keadaan yang berbahaya dan dengan itu mengeluarkan perintah perobohan. Oleh itu, sebaik sahaja perintah perobohan dikeluarkan dan tidak dibatalkan, perlu ada pematuhan ketat dengan peruntukan-peruntukannya untuk memastikan keselamatan pemilik-pemilik dan juga orang awam. Didapati bahawa cubaan defendan untuk mematuhi tidak sama dengan pematuhan. Defendan bersalah terhadap ketidakpatuhan dengan undang-undang dan undang-undang kecil yang relevan dan dengan ketidakpatuhan tersebut telah memungkiri syarat-syarat yang termaktub untuk membaiki unit-unit yang terjejas. Oleh itu, mengambil keseluruhan keterangan yang dikemukakan, mahkamah mendapati bahawa plaintif telah berjaya membuktikan atas imbangan kebarangkalian bahawa unit-unit yang terjejas mengalami kerosakan semasa tanah runtuh dan bahawa defendan dan juruteranya dan kontraktornya mempunyai kewajipan untuk

mematuhi secara ketat dengan peruntukan AJPB tetapi telah gagal (lihat perenggan 126–129, 142, 152–153 & 160–161).

(3) Melalui klausa 16 polisi induk defendan berhak untuk memilih untuk mengembalikan hartanah yang rosak dan bukan membayar jumlah kerugian atau ganti rugi. Walau bagaimanapun, dengan perintah perobohan dalam pelaksanaan hak defendan untuk memilih menjadi bersyarat. Pada masa yang sama MPL tidak boleh menyatakan ia tidak mengetahui tentang kerja-kerja pemulihan yang sedang dilaksanakan oleh defendan. Dengan sikap berdiam diri mereka dan ketiadaan tindakan oleh MPL mungkin memberikan impression bahawa kerja-kerja pemulihan sebenarnya diluluskan atau dibenarkan. Berdasarkan keterangan yang dikemukakan berkaitan keadaan pada masa material, mahkamah bersedia untuk menerima bahawa terdapat satu bentuk penangguhan tidak formal perintah perobohan tersebut. Tetapi, kewujudan perintah perobohan, walaupun 'suspended', imposed kewajipan yang lebih besar ke atas defendan untuk mematuhi secara ketat dengan undang-undang yang digubal untuk melindungi situasi kegagalan bangunan yang sedemikan (lihat perenggan 133–134, 143 & 162).

(4) Membaca klausa 16 polisi induk menunjukkan bahawa tidak ada keperluan dari segi undang-undang untuk plaintif-plaintif diberikan maklumat dan butir-butir mengenai sifat dan kualiti kerja-kerja pembaikan yang sedang dijalankan. Oleh itu defendan tidak memungkiri dalam menafikan pemberian dokumentasi yang diminta oleh plaintif pertama (lihat perenggan 149–150).

(5) Hujahan defendan untuk elaun untuk kebaikan tidak timbul berikutan fakta bahawa kerja-kerja pembaikan telah dijalankan bertentangan dengan perjanjian di antara pihak-pihak dan dalam ketidakpatuhan undang-undang yang beraplikasi (lihat perenggan 167).

(6) Jumlah sebanyak RM1,386,200 yang dinyatakan oleh plaintif-plaintif sebagai kos untuk merobohkan dan memulihkan unit-unit yang terjejas telah diterima kerana defendan memilih untuk tidak mempertikaikan sebut harga atau melakukan pemeriksaan balas terhadapnya. Plaintif-plaintif berjaya membuktikan jumlah RM1,386,200 daripada RM1,547,400 yang dituntut untuk kos pemulihan. Tuntutan untuk RM75,521.25 untuk membersihkan serpihan-serpihan dan tuntutan untuk RM25,000 sebagai kos profesional tidak diluluskan. Plaintif-plaintif oleh itu diawardkan jumlah RM1,386,200 untuk ganti rugi khas, faedah pada kadar 8% setahun dari tarikh pemfailan guaman sehingga penjelasan penuh serta kos (lihat perenggan 173–176).]

Notes

For cases on fire insurance generally, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 96–134.

Cases referred to

Chip Fong (Kuala Lumpur) Sdn Bhd & Ors v Guardian Royal Exchange Assurance (Malaysia) Sdn Bhd [1992] 1 MLJ 598; [1991] 2 CLJ (Rep) 434, HC (refd)

Reynolds and Anderson v Phoenix Assurance Co Ltd and others [1978] 2 Lloyd's Rep 440 (refd)

Times Fire Insurance Co, The v Hawke (1858) 1 F & F 406 (refd)

Legislation referred to

Street, Drainage and Building Act 1974 ss 70, 83, 83(1), (3), (4)

Uniform Building By-Laws 1984 by-laws 3, 3(1), (2), 25, 25(1)

CM Wong (KF & Co) for the plaintiffs.

Liew Teck Huat (Chong Wei Chei with him) (TH Liew & Partners) for the defendant.

Amelia Tee Abdullah JC:

[1] The plaintiffs, Maxi Development Sdn Bhd ('the first plaintiff'), Hoo Hee Heng @ Ho Chee Sin ('the second plaintiff'), Rita Engineering Sdn Bhd ('the third plaintiff'), Hoo Hee Yong @ Hok Chi Yong ('the fourth plaintiff') and Lee Kim Seng ('the fifth plaintiff') claim against the defendant, Allianz General Insurance Malaysia Bhd, for damages suffered as a result of breach of Insurance Policy No 03FPJ002862 by the defendant for failing to rectify those areas of the Casa Vinca Apartments which were affected by the landslide back to their original condition. The defendant disputes the plaintiffs' claims and denies that the plaintiffs are entitled to any of the remedies sought.

THE PLAINTIFFS' CASE

[2] It is the plaintiffs' case that they were insured with the defendant under a master policy known as Policy No 03FPJ002862 ('the said policy'). The property covered under the said policy consists of three blocks of four storey buildings known as the Casa Vinca Apartments in Kuah, Langkawi, excluding foundation but inclusive of outbuilding, wall and fencing.

[3] The first plaintiff, Maxi Development Sdn Bhd, is the registered owner under the master title of the insured property and the owner of all the common property as well as Units C-G-8, C-1-8, C-2-8 and C-3-8. The second plaintiff, Hoo Hee Heng @ Ho Chee Sin, is the owner of Unit B-G-6. The third plaintiff, Rita Engineering Sdn Bhd, is the owner of Unit B-1-6, the fourth defendant, Hoo Hee Yong @ Hok Chi Yong, of Unit B-2-6 and the fifth defendant, Lee Kim Seng, of Unit B-3-6. The aforementioned units are collectively referred to as 'the affected units'.

[4] Tham Kum Weng (PW1) was offered as an expert witness by the plaintiffs. A director of T Corp Engineers Sdn Bhd, PW1 is a qualified engineer registered with the Board of Engineers Malaysia with 35 years' experience. He is a Fellow of the Institute of Engineers Malaysia and Chartered Engineers, United Kingdom, and a Member of the Institution of Civil Engineers, London. T Corp Engineers carries on business as civil and structural consulting engineers specialising in structural investigations and assessment of building defects or deformation.

[5] The report entitled Independent Professional Opinion Report on the Structural Safety Aspects of the Repaired Works to the Building Damages on Building Block B and C of Casa Vinca Apartments on Lot 603 Pokok Asam, Kuah, Langkawi, Kedah (P1) was prepared by PW1 for the first plaintiff. From his investigations, he concluded that the first plaintiffs' concerns over the overall structural stability, integrity and safety of the repaired portions of Blocks B and C of Casa Vinca Apartments were justified.

[6] PW1's finding was based on the following observations:

(a) *Due engineering process as per normal professional engineering practice appeared not to have been followed prior to execution of the remedial works*. Normal accepted professional engineering practice for such major repair works would have incorporated overall engineering assessment of the damages and an evaluation of the effect on the building block; conceptual proposals for the rectification; execution of detailed design and preparation of documentation including calculation, drawings, bill of quantities, method statements, safety procedures and workmanship and quality control procedures; and adequate supervision. Because of the non-availability of critical documents, repair works were carried out by Langkawi Multiple Works without first plaintiffs knowledge of the exact nature of the said works.

(b) *Lack of proper specification for essential remedial works materials. No proper documentation on material quality control especially material tests results. As such, quality and strength of such materials were uncertain*.

(c) *There were inherent weaknesses in the steel H-columns end connections where rigid column end connections had not been fully restored to ensure full overall building stability and integrity*.

(i) The use of steel H-columns with simple bolted end connections to replace the damaged RC columns would have altered the overall design concept of the whole building structure. The column end binding moments capacity of a fully connected column joint may not be realised and may affect the overall building stability. The

problem becomes more severe during occurrences of extreme situations of strong winds and induced lateral forces.

(ii) For each column end connection, there was only one row of five 16mm diameter bolts to provide for column to beam connection. There was no calculation to justify the capacity of the column connection as against the original rigid column connection. The full tension and shear capacity of the bolts could not be realised due to the rather short bolt anchor embedment depth as well as the short edge distance. The end result was that the steel H-columns would function simply to sustain vertical loads whilst its capacity to sustain lateral loads or torsional (twisting) load may be highly uncertain.

(d) *There appeared to be very little or no site documentation with respect to the manner of construction supervision and quality control.*

[7] PW1 testified that his report and professional opinion were based on site visits on 2 December 2004 and 11 January 2005 as well as photographic records as to the appearance of the repaired sections of the affected building. At the time of his visits, all the plaster work had been completed so that from external appearance, it would appear that the repair works were satisfactorily done. Upon review of construction drawings and in light of the manner and circumstances in which the repair works were carried out, PW1 was of the view that issues about the building's structural safety, stability and integrity had not been properly addressed. However, he admitted during cross-examination that after his two site visits, he did not conduct any further investigations before coming to court. He last saw the building five years ago and at that time it would appear that the repair work was satisfactorily done. He was unaware of the condition of the building at the present time.

[8] Among the various pertinent observations made by PW1 in his evidence were:

(a) The main structural components of the beams and columns for the affected units had suffered significant damage and displacement. It was unclear if any building verticality assessment was carried out to confirm adequate structural stability and integrity.

(b) It was unclear how the grout materials between the top steel plate of the steel column and the bottom of the RC beam was placed as the gap was very narrow.

(c) In view of the limited cover to the new steel column, it was unclear whether anti-corrosion application was applied prior to encasing with a thin layer of external repair material.

(d) The recasting of the RC columns, formworks were only used for the two exposed side faces instead of the usual four faces.

(e) RC intel beams had not been provided over the openings to support the brickwork wall above; and

(f) The gaps between the steel columns and the RC columns or beams were just hand-patched with cement mortar instead of being grouted with shrinkage compensating mortar.

[9] PW1 was on hand to observe the on-site hacking and testing works that were conducted on 11 January 2005. This included observation of site hacking of beam-column joints to note the structural connection details of the new steel H-column to the RC beam in order to provide factual findings on the structural safety elements of the repaired works. From his observations, he found that all the bolts were 16mm diameter anchor bolts with short embedment length of about 80mm when the usual bolt embedment length should be at least 100mm for full effectiveness. He pointed out that unless there are structural engineering calculations to support the use of the shorter length, the usual manufacturer's recommendation should have been followed. He also noted that due to the small RC beam width, the presence of reinforcing bars in the beam and the need to avoid the central web of the steel H-column, only one row of bolts were installed at a very small edge distance from the edge of the beam. Due to the short edge distance of the anchor bolts, the capacity of these bolts would be much lower than the maximum rated capacity.

[10] Based on his observations, PW1 was thus of the opinion that the certification by CH Perunding on 21 July 2004 (p 410 of C2) and Nathan-Jones Architect on 22 July 2004 (p 412 of C2) in respect of the completed repair works was questionable. He pointed out that the repair works were carried out despite a demolition order issued by the Majlis Perbandaran Langkawi ('MPL'). Under the provisions of the Street, Drainage and Building Act 1974 ('SDBA 1974'), repair works should not be carried out unless there was proper submission of plans to MPL, which was not done. He was also concerned about the failure to follow due engineering process and the inherent weaknesses in the steel H-columns end connections which may lead to failure of the connection in extreme situations.

[11] PW1 did not report to MPL about his misgivings as regards the repair works. He denied that he did not do so because he was neither convinced of nor had he any evidence that the building was structurally unfit or unsound. He explained that he could not report because he could not accuse another engineer without 'the full evidence of drawings and design assumptions'. He denied saying that the building was unfit or unsafe but claimed to have only said that 'there was inherent structural weaknesses to the buildings so that

potential failure may happen in the event of strong winds or induced lateral forces'. He testified that he did not submit a copy of his report to MPL because he 'was not obligated' to do so. He claimed that he was merely asked to provide an independent opinion.

[12] PW1 agreed that the certification of CH Perunding as well as that of Nathan-Jones Architect forwarded to MPL would form part of the official records of the building. When asked if he had seen these two certificates before he prepared his own report, his response was that he had not.

[13] During cross-examination, PW1 was asked about the photographs which form part of the basis for his conclusions. These photographs (C2 pp 621–627), given to him by the first plaintiff, were taken at the initial stages of the repair work. He disagreed that the photographs did not provide any basis for him to form any opinion as to whether the repairs were properly done as the work was incomplete at that time. He claimed that the photographs 'actually captured all the structural weaknesses that may cause stability problems'.

[14] Through cross-examination, it would appear that some of PW1's findings/opinions/conclusions may be questionable, such as:

(a) *Item 4.4(b)(v)* — PW1's comment about 'certain columns ... (having) some missing bolts'. This would appear to be merely the witness's doubts.

(b) *Item 4.5* — although PW1 hacked the columns and removed grout and repair materials, no tests were done on the extracted samples. He claimed that testing was not done because no specifications were available. This raises the question as to why the grout and repair materials were extracted in the first place.

(c) *Items 5.3(b)(i)–(iii)* — Since PW1 did not have sight of the relevant documentation, he would not be able to say if normal accepted engineering process was adopted.

(d) *Item 7.1* — PW1 was unable to determine the structural design concept because relevant structural drawings and design calculations were not made available to him.

(e) *Re the columns in the affected units* — A total of eight units of apartments were affected by the landslide. From the drawings, there would be a total of 12 columns in the eight units. He admitted carrying out hacking on only four columns (three in Block C and one in Block B) which were chosen at random and based on accessibility.

He denied that his report was unreliable because he did not have relevant and critical information to assess the structural fitness of the affected areas or to carry out a proper investigation of the materials used when arriving at his conclusion.

[15] PW1 was asked whether he had seen CH Perunding's report at pp 294–349 of C1 when he was appointed by the first plaintiff to give his second opinion. His answer was that he might have seen bits and pieces but not the whole report. He claimed not to have sight of the photographs because had he seen them, he would have asked for them. He denied that he did not comment about CH Perunding's report because there was nothing wrong with it. According to him, the consulting engineer's report was inadequate and there was too little in it for him to comment.

[16] PW1 admitted that he was given the method statement (pp 635–643) by the first plaintiff when he was asked to give his second opinion. He agreed that he did not make any reference to the method statement in his report claiming that it was not important because the document was so inadequate. In re-examination, he went on to say that the document was a mixture of progress reports and what needed to be done. A proper report would have been a report on the actual stage of construction but with no structural details.

[17] PW1 testified that the independent report provided by him was his professional opinion based on relevant documentation and assessment based on his professional experience and training. His opinion was also based on relevant drawings, various reports from consulting engineers and developers, on photographs, site inspection and testing.

[18] *Hoo Hee Yong @ Hok Chi Yong ('PW2')*, the managing director of the first plaintiff, is the developer and registered owner of the project land of the Casa Vinca Apartments and the legal and beneficial owner of units C-G-8, C-1-8, C-2-8 and C-3-8. The Perakuan Kelayakan Bagi Menduduki or the Certificate of Fitness for Occupation ('P2') certifying the Casa Vinca Apartments fit for occupation was issued by MPL on 11 November 1999.

[19] PW2 is also the fourth plaintiff and the legal and beneficial owner of unit B-2-6 of the said apartments. The sale and purchase agreement dated 19 March 1997 ('P3') was entered between the first plaintiff and himself for the purchase of unit B-2-6. He bought it even before the project was ready because the first plaintiff needed funds. He identified p 191 of C1 as the certificate of insurance in respect of his unit and confirmed that *he claimed under this certificate in respect of the damage to his unit*. When cross-examined as to the extent of his loss, he agreed that he had sued the defendant with no monetary value for his claim and that he could not quantify his claim in respect of his unit

B-2-6. PW2 also agreed that units C-G-8, C-1-8, C-2-8 and C-3-8 were registered under the name of the first plaintiff and that these units were insured under separate policies of insurance. He admitted that he was also unable to quantify the first plaintiffs claims in respect of these four units which had different values and which were damaged to varying degrees. However, he did not agreed that his and the first plaintiffs' claims were unsubstantiated claiming that 'there is a collective policy which covers the 3 blocks of buildings'. He confirmed that all 8 units were unoccupied.

[20] According to PW2, the defendant was the insurance company and the plaintiffs the insured parties under a master fire policy insurance contract effected on 18 August 2003 under Certificate of Insurance No 03FPJ002862. Under this policy, '3 blocks of 4 storey buildings, excluding foundation, inclusive outbuilding, wall and fencing' known as Casa Vinca Apartments in Kuah, Langkawi was insured from 8 July 2003 to 7 July 2004. The sum insured was RM7m. PW1 also identified various certificates of insurance in respect of units owned by the first plaintiff as follows:

(a) Certificate No 03FPJ002862*0058 for Unit C-G-8;

(b) Certificate No 03FPJ002862*0066 for Unit C-1 -8;

(c) Certificate No 03FPJ002862*0074 for Unit C-2-8; and

(d) Certificate No 03FPJ002862*0082 for Unit C-3-8.

[21] Material terms in the said policy were as follows:

(a) *NRP 10(1) — Subsidence and Landslip Endorsement (Standard Cover)*. The policy would extend to cover loss or damage to the property caused by subsidence or landslip.

(b) *RC 02B — Removal of Debris*. This would cover costs and expenses incurred in the removal of debris, dismantling and demolishing, shoring up or propping property destroyed or damaged by fire or by any other peril insured against.

(c) *RC 03B — Architect's, Surveyor's and Consultant's Fees*. This would cover architect's, surveyor's and consulting engineer's fees incurred in the reinstatement of the property insured.

(d) *RC 16A — Reinstatement Value Clause*. In the event the property insured is destroyed or damaged, the amount payable is to be calculated based on the cost of replacing or reinstating on the same site property of the same kind or type.

(e) *RC 18 — Reinstatement in Compliance with the Requirement of Public Authorities*. This covers the additional cost of reinstatement of the

destroyed or damaged property incurred solely by reason of the necessity to comply with building or other regulations.

(f) *RC 28 — Outbuilding Clause*. The insurance under buildings includes walls, gates and fences, small outbuildings, extensions, annexes, exterior staircase, fuel installations, steel or iron frameworks and tanks and the insurance under contents includes the contents of each outbuilding.

(g) *Clause 16* — An option is given to the company to reinstate or replace the property damaged or destroyed instead of paying the amount of the loss or damage.

[22] The plaintiffs' claim is for the reinstatement of the insured property that was damaged by the landslide. According to PW2, landslides are covered in the policy under 'Subsidence and Landslip'. On 13 September 2003, wet earth from the slope adjoining the land had slid-down and spilled over the compound of the Casa Vinca Apartments. There was continued rain and mudflow from the said slope. The first plaintiff placed concrete blocks about 2 meters from the affected area to prevent mud from further flowing into the affected blocks and engaged an earthwork contractor to remove spilled earth. However, due to the continuous rain and earth movements, the situation worsened on 2 October 2003 when massive amounts of wet earth slid downwards from the same spot.

[23] The spilled earth reached up to the second floor of Block B and the first floor of Block C and caused damage to the RC retaining wall of the slope as well as substantial building damage to the end of Blocks B and C. More specifically, the landslide caused damage to the columns and/or slab beams or foundation structure, walls, windows and doors of units B-G-6 and C-G-8 and also damaged the foundation structure, walls and windows of units B-1-6, B-2-6, B-3-6, C-1-8, C-2-8 and C-3-8. Damage was also caused to the retaining wall, road, car park, drains, street lights, electric cables and landscape of the said apartments.

[24] The first plaintiff duly informed the defendant as well as MPL about the landslide and consequential damage to the affected units. A contractor was engaged to clear landslide materials from the affected area. The first plaintiff appointed YK Claims Consultants as its claim consultant and this was informed to McLarens Saksama (M) Sdn Bhd ('McLarens'), the defendant's loss adjusters on 16 December 2003.

[25] Evidence was led that a letter dated 23 December 2003 was received by the plaintiff from MPL instructing them to demolish the end units of Blocks B and C which had been affected by the landslide '*untuk mengelak dari kejadian yang tidak diingini yang boleh mengancam keselamatan dan nyawa penghuni*

apartment'. Following this development, YK Claims Consultants wrote to McLarens submitting a claim for RM1,547,400 and attaching MPL's demolition letter as well as two quotations for the reinstatement works. PW2 testified that in view of the extensive damage, MPL's demolition order was consistent with the recommendation of Jurutera Perunding SPC ('Jurutera Perunding'), the plaintiffs' consulting engineer. Jurutera Perunding's report ('P6'), forwarded to the defendant and their consultants, recommended, inter alia, that:

(a) Landslide materials and debris to be cleared;

(b) Damaged RC retaining wall to be demolished and rebuilt. During the reconstruction stage, sheet piling wall is recommended as a temporary support system;

(c) The affected units in Block B and C to be demolished for all floors to be rebuilt. Building foundations to be examined to see if they had been damaged, and if necessary, to be rebuilt;

(d) Damaged roads and drainage system; damaged water pipelines, sewer pipes and manholes; compound lightings to be reinstated; and

(e) Affected area to be re-landscaped back to its original condition.

[26] PW2 agreed during cross-examination that he had not incurred any expenses to reinstate the units because no reinstatement had been done. He had not spent a single sen out of the RM1,547,400 that he was claiming for the reinstatement works and was also unable to apportion the amount claimed to the eight affected units.

[27] On 18 February 2004, a meeting was held between the first plaintiff with MPL, Jurutera Perunding, CH Perunding and McLarens to discuss the plaintiffs' claim. CH Perunding was the defendant's Consulting Engineer. PW2 testified that the defendant and their engineer had suggested that the affected units be reinstated despite the order of MPL and the recommendations of Jurutera Perunding for demolition. In objecting to the suggestion, plaintiff and Jurutera Perunding took the stand that rectification without demolition first would be unsafe and unstable as the structure of the affected units had been extensively damaged by the landslide. The court notes that the minutes of the meeting ('P7') shows that the engineer for MPL (Encik Zahir) was of the view that it was not safe to rectify the affected units which had to be '*demolished entirely*'.

[28] As a result of the defendant's insistence on repairing the affected units without demolition, the plaintiff wrote a letter dated 25 February 2004 ('P8') to the defendant reluctantly agreeing with the suggestion to repair but subject

to 14 conditions, amongst which are as follows:

(a) The defendant is to carry out and complete the works shown on the contract documents on a turnkey basis to the reasonable satisfaction of the architect and the owner;

(b) The defendant is to comply with all relevant written laws, rules, orders, regulations or bylaws in relation to the works to be carried out;

(c) Completion date for reconstruction of the retaining wall is 31 May 2004 and for the whole works is 31 July 2004;

(d) Defects liability period of 18 months commencing from the day stated in the certificate of practical completion; and

(e) Compensation of RM3,000 per day for loss of income if the defendant fails to complete the works by the completion date.

[29] A meeting was convened on 9 March 2004 to discuss, inter alia, the plaintiffs' conditions. According to PW2, the defendant had agreed with the said conditions except with changes on water and electricity supply. Consequently, the plaintiff wrote to the defendant on 16 March 2004 to confirm the agreement and stating that the defendant could commence the repair works provided that all safety precautions and requirements were met ('P8'). However, during cross-examination, PW2 was referred to the draft minutes of the said meeting (C2 – p 450) and the defendant's letter dated 22 March 2004 (CI – p 367) wherein he had agreed to the appointment of Ir Cheah Chin Huat to supervise the repair works. He agreed that under condition (b), the repairs works should be carried out to the reasonable satisfaction of the architect. He also confirmed that he had agreed to 'reasonable compensation' in condition (f) and withdrawn his earlier proposal of compensation of RM3000 per day. Following this exchange, PW2 then withdrew para 32(b) of his claim for liquidated damages in respect of all the plaintiffs.

[30] The plaintiffs contend that when rectifying the affected units, the defendant would have to comply with the express and implied terms and conditions of the said policy as well as those agreed conditions as laid down in the 25 February 2004 letter. Further, the defendant would have a duty and responsibility to be careful under the common law and to, inter alia:

(a) Disclose all information which is material in respect of the performance of the defendant's obligations;

(b) Conduct overall engineering assessment of the building damage and engineering evaluation of its effect on seemingly unaffected parts of the building; make detailed design with drawings and calculations showing

A construction details, bill of quantities, method statements, safety procedures, workmanship and quality control procedures; and

(c) Carry out the rectification works with due diligence and care and in compliance with all laws and by-laws.

B

[31] It is the plaintiffs' complaint that the defendant had failed to disclose any information in respect of the rectification works even when requested repeatedly by them and their solicitors. The plaintiffs thus instructed Jurutera Perunding to inspect the affected units. On 22 April 2004 Jurutera Perunding
C accompanied by Mr Kan Chia Leong, the first plaintiffs site supervisor, visited the affected units. Upon inspection, it was found that the repair works were not being properly carried out and had deviated from Jurutera Perunding's original structural plan. Safety procedures while conducting the repair works were not properly followed. The photographs would show that:

D (a) Existing column reinforcement was cut off for unit C-G-8 (Photo No 1);

(b) RC frames were out of alignment; first floor slab/beam has tilted (Photo No 2);

(c) RC frames for B-G-6 and B-1-6 were out of alignment.

E

After the repair works commenced around April 2004, PW2 went to the site twice. The person responsible for the site at this time was the defendant's consulting engineer, Mr Cheah.

F **[32]** These findings were duly reported to the first plaintiff on 26 April 2004 and he, in turn, wrote to the defendant on 17 June 2004 to complain that the rectification works were not being properly carried out and enclosing a copy of Jurutera Perunding's report. The first plaintiff voiced its concern that the rectification works '*would not adequately satisfy the structural stability and*
G *integrity of the affected buildings*' and suggested that it would be appropriate to engage an independent engineer with specialist knowledge on structural stability and assessment to provide an independent report on the on-going repair works. The defendant's response (dated 21 June 2004) was that they would review the matter.

H

[33] However, on 23 July 2004 the first defendant received a letter dated 19 July 2004 from McLarens informing that repair works for the affected units had been completed. On 29 July 2004, it received a letter dated 26 July 2004 from the defendant enclosing a certificate of practical completion
I (architectural finishes) from Nathan-Jones dated 22 July 2004. The plaintiffs responded by informing that as the defendant's repair procedures and methods were unacceptable, they were 'of the opinion that the quality of works is poor and also the stability of the structural frame has been compromised' and as such, they were treating the repair works as incomplete.

[34] PW2 agreed during cross-examination that he was a mechanical engineer and not a civil engineer. He also admitted that he had never practiced as an engineer. He agreed that an architect cannot issue a certificate of practical completion unless the work was practically complete.

[35] Vide its letters dated 13 August 2004 and 30 August 2004, the plaintiffs reiterated their request for the damage assessment report, repair method statements, survey records and construction drawings within 14 days. When their requests were not acceded to, Messrs KF Low & Co, on behalf of the plaintiffs, wrote to the defendant to request for the said documents as well as to raise certain queries as regards the plans, specifications and planning approval from the relevant authorities. The defendant's response through their solicitor's letter dated 9 November 2004 stated, inter alia, that MPL had withdrawn 'the Notice of 23.12.2003 on 18.2.2004 and accepted that reinstatement works were an appropriate way to deal with the matter' (p 121).

[36] The plaintiffs were unhappy with the above stated letter and sought confirmation from MPL through their solicitors. *MPL's response (P11) was that the demolition order was still in force as they had never withdrawn it. MPL also confirmed that they had neither received an application for approval of the rectification works nor had they been informed that the rectification works had been completed. And lastly, MPL stated that they had never issued any approval that the affected units were fit for occupation*.

[37] On 9 December 2004, the plaintiffs' solicitors wrote to the defendant's solicitors to request for information and documents about the repair works as well as documentary evidence of the withdrawal of MPL's demolition notice and evidence that MPL was satisfied with the reinstatement work. He disagreed with the suggestion that whilst the plaintiff has to provide information and documents to the defendant to reinstate the premises, there is no corresponding requirement for the defendant to disclose documents to the first plaintiff.

[38] PW2 testified that he did not agree with the work done because 'from the progress of the repair works and the photographs taken at the site, we saw that the work was not being properly done. So we engaged T-Corp who is a specialist in repair works'. T-Corp Engineers' Independent Professional Opinion Report and their conclusions are found in P1.

[39] PW2 itemised the plaintiffs' claims against the defendant as follows:

(a) RM25,000 as fees for engaging engineers to investigate the repair works;

(b) RM75,521.25 as costs for removal of soil/earthworks from the affected areas and its surroundings; and

(c) RM1,547,400 as the total cost for reinstatement of the affected units to their original position.

[40] During cross-examination, PW2 had explained that his claim as the fourth plaintiff as well as on behalf of the first plaintiff was based on the master insurance policy and the individual insurance certificates covering the various units. However, in re-examination, he told the court that 'all the claims are under the Master Policy'. When asked why he had not spent a single sen of the RM1,547,400 that he was claiming on reinstatement works, he offered the explanation that 'This is under the Master Policy to pay us'. He explained that the amount could not be apportioned between the eight units because the whole amount was for demolishing the eight units and the price was given by the contractor.

[41] As regards the claim of RM75,521.25 for removal of soil, PW2 agreed that the only document that he was relying on is the first plaintiff's letter dated 11 March 2004 (bundle A – p 49). He admitted that he had not provided the 19 invoices in support of his claim. He confirmed that the debris was removed not from the units but from outside the units.

[42] The court notes that PW2 was unable to say if the plaintiffs were claiming for the retaining wall in this case. It is also noteworthy that PW2 agreed with the proposition that neither the first plaintiff nor the fourth plaintiff was able to sustain a claim for the alleged damage because they were not able to provide any material evidence to show the loss sustained by them in relation to their respective units.

[43] The third plaintiff, *Rita Engineering Sdn Bhd*, is the beneficial owner of unit B-1-6 of the Casa Vinca Apartments. *Ng Say Chong ('PW3')*, one of the directors of the third plaintiff, identified the sale and purchase agreement between Rao's Holding Sdn Bhd and the third plaintiff dated 12 June 2003 ('P12'). The Certificate of Insurance No 03FPJ002862*0030 ('P13') shows that the third plaintiff is the insured and the defendant is the insurer of unit B-1-6. The third plaintiff's claim is for reinstatement of the said unit. He confirmed that the third plaintiff is insured under the master policy under the name of the first plaintiff and that they were claiming through the first plaintiff. When it was pointed out that the pleadings did not reflect this, PW3 offered the explanation that they were suing collectively.

[44] PW3 agreed that the third plaintiff was only entitled to claim in respect of damage to unit B-1-6. He was however unable to tell the court the specific loss suffered by third plaintiff as a result of damage to unit B-1-6 citing the reason that 'to reinstate back the unit, we need to consider the whole block instead of the individual unit' as its unit was sharing the foundation with the lower floors.

[45] The fifth plaintiff, *Lee Kim Seng ('PW4')*, identified the sale and purchase agreement dated 13 June 2000 ('P14') between Ooi Chair Ben as vendor and himself and Lee Tai Fung as purchaser of unit B-3-6 of the Casa Vinca Apartments. Certificate of Insurance No 03FPJ002862*0089 ('P15') shows that the fifth plaintiff and Lee Tai Fung are the insured and the defendant is the insurer of unit B-3-6. The details of the property insured are described as 'ON 3 BLOCKS OF 4 STOREY BUILDINGS, EXCLUDING FOUNDATION, INCLUSIVE OUTBUILDING, WALL AND FENCING'. PW4 complained that he wanted to stay in his unit except that he did not think it was safe to do so.

[46] The second plaintiff, *Hoo Hee Heng @ Ho Chee Sin ('PW5')*, identified the sale and purchase agreement dated 19 March 1997 ('P16') between the first plaintiff and himself wherein he purchased unit B-G-6 of Casa Vinca Apartments for RM180,000. Under Certificate of Insurance No 03FPJ002862*0024, the second plaintiff is described as the owner of unit B-G-6.

[47] The plaintiffs also relied on the evidence of *Chong Soo Phin ('PW6')*, a civil and structural consulting engineer operating a sole proprietorship under the name of Jurutera Perunding SPC. He is a member of the Institute of Engineers Malaysia with 29 years' experience.

[48] PW6 testified that he was the civil and structural engineer of the first plaintiff for the project known as the Casa Vinca Apartments and that he had designed and supervised the construction of the project from start until completion. The certificate of fitness for the apartments was issued on 11 November 1999 ('P2').

[49] After the landslide, the first plaintiff requested PW6 to carry out a site visit and prepare a report on the damage since he was the consulting engineer for the said property. His report (P6), based on visual examination, appears at pp 456–469 of C2. During his several site visits, he observed that landslide materials had spilled over the RC wall onto the roadway separating the RC wall and the buildings and that the RC retaining wall had broken off at the top portion extending approximately 30 meters in length. There was a huge landslide where a big block of soil had slid down and extensively damaged Blocks B and C of the property.

[50] The professional opinion and recommendations of PW6 had been outlined earlier in the evidence of PW2. *PW6 testified that he had recommended demolishing and rebuilding the affected units because in his professional view and judgment, and further as the civil and structural engineer who designed the said units, the structure elements of the units had been extensively damaged by the*

landslide. The columns supporting the affected units were broken, displaced and cracked and the earth pushing inside the building had broken the walls of the units. The building was a four storey building where the supporting weight of the affected units is at the ground floor. If the walls and columns in the affected units are damaged by the landslide, it would cause the structure of the affected units to be unstable. During cross-examination, PW6 admitted that his recommendation at item 5(c) that the affected units be demolished and rebuilt was made upon an inspection of the damaged property but without conducting any tests.

[51] PW6 corroborated the evidence of PW2 as regards their meetings with CH Perunding — the defendant's consultant engineer, McLarens — the defendant's loss adjuster and officers of MPL to discuss issues relating to the damage to the affected units. According to PW6, he and the first plaintiff had 'strongly objected' to the suggestion that the units be rectified without first demolishing them. Unfortunately, he was unable to show any record of his strong objections anywhere in the draft minutes ('P7'). On the contrary, reference was made to item C of P7 where PW6 confirmed that the meeting had discussed the possibility of repairing or rectifying the building provided that safety interests are given paramount consideration.

[52] PW6 testified that on the instructions of the fourth plaintiff, he together with the first plaintiffs' site supervisor had conducted a site visit on 22 April 2004 to observe the rectification and repair works. He could not remember if there was an agreement between the first plaintiff and the defendant before April 2006 that the defendant could go ahead and repair the building without demolishing it. He claimed to be unaware of the meeting of 9 March 2004 ('P9') and neither was he informed about it by the first plaintiff. He only knew that the defendant had appointed contractors to carry out the repair work when he went on site. He did not know when they commenced work.

[53] PW6 testified that the repair works were not properly carried out and had deviated from the original structural plan. Safety procedures while conducting repairs work were not followed. He took photographs of his observations and subsequently wrote to the first plaintiff setting out his observations supported by photographs (bundle B – pp 105–107). According to PW6, the photographs show that steel reinforcement at the columns had been cut, the first floor beam or slab at unit B-1-6 had tilted meaning that the slab had suffered extensive damage and the steel had yielded. He had also observed that the proposal to replace the concrete beams with the steel I beams was highly unacceptable as the proposed steel I beams would not only alter the original design concept but the connections to the existing concrete beams were very weak, unstable and unreliable. He agreed that he did not carry out

any further site inspection before the repair works were completed. He conceded that since he had not been back to the site since 22 April 2004, he would not know if there had been 'adverse consequences' arising from the repairs to the site.

[54] It is interesting to note that although PW6 had stated in his letter of 26 April 2004 that 'It appears that the contractor does not adhere to the Consultant's proposal as outlined in his report', he had admitted during cross-examination that he had not seen nor had he asked for a copy of the consultant's proposals at the time when he wrote his letter. All that he had was merely the fourth plaintiff's verbal communications as to what those proposals were.

[55] PW6 told the court that in carrying out the rectification works, the defendant had a duty and responsibility to act in good faith and with diligence in discharging its duties as the insurer. They had a duty and responsibility to 'disclose all information whether requested or not which is material in respect of the performance of the defendant's obligation'. There should also be compliance with normal accepted engineering practice and all applicable laws when carrying out the rectification works. In light of his observations and findings, PW6 was of the opinion that the certification by CH Perunding on 21 July 2004 and by Nathan-Jones in respect of the completion of the repair works was questionable.

[56] The plaintiffs' seventh witness, *Tung Nai Choy ('PW7')*, the Managing Director of Sealand Drillers (M) Sdn Bhd, had 37 years' experience in the field of soil investigation and testing. He produced his factual report ('P17') in relation to the preliminary investigations following the landslide at Casa Vinca Apartments. According to PW7, the purpose of the report was to enable the Consulting Engineers, Jurutera Perunding Wawasan, to obtain data for slope stability analysis. The data contained in the factual report was forwarded both to the clients as well as to Jurutera Perunding Wawasan.

[57] The plaintiffs' last witness was *Chia Khoon Khean ('PW8')*. He is an adviser with Jurutera Perunding Wawasan, a company dealing with consultancy in civil engineering. He has a degree in civil engineering and has been registered with the board of engineers for the past 14 years. PW8 identified the Geotechnical Report at pp 528–579 and the Forensic Investigation on Damage of Reinforced Concrete Wall at pp 580–589 of C2 as his reports on the investigation. He went twice to the site though he was unable to recall the exact dates of his visits.

[58] His conclusions as found at p 589 were that the design, structural integrity and internal stability of the RC retaining wall were adequate. Core

tests were used to test the strength of the original retaining wall. It was found that the excessive rise of the water table and continuous rainfall had contributed to the landslide (p 548) and this in turn had caused the collapse of the retaining wall. The assessment of the retaining wall was based on calculations carried out which showed that the factor of safety for overturning, sliding and bearing were all within the acceptable limit (p 586) in accordance with the British Standard Code of Practice BS 8110. Regarding the Geotechnical Report, reliance was placed on the soil investigation report, the civil and structural plan of the service apartment, the architectural plan of the building, the survey plan of the area and a factual report by another engineer.

[59] PW8 explained during cross-examination that it took time to prepare the reports because it was a massive landslide and they had to get a contractor on board to do soil investigation. The soil investigation report is a factual report. The soil investigator will take samples of the soil and send it to the laboratory for testing in order to determine the soil parameters. PW8 would then use the data in the said report to interpret and come to a conclusion on the causes of the landslide. He admitted that he had not considered the original design of the retaining wall but had found the design of the wall adequate based on his own calculations.

THE DEFENDANT'S CASE

[60] Parama Nathan (DW1) is an architect practicing under the name and style of Nathan Jones Architect. After graduating from the National University of Singapore with a Bachelor of Architecture in 1987, she worked in various firms before setting up her own practice in 1993.

[61] DW1 took the court through the different steps that she would have to take when appointed as an architect. This would involve production and submission of plans, leading the team for the developer during the tender process, appointing the contractor on behalf of the developer, conducting site visits to check on the work to ensure that it is on schedule and maintaining cost control, upon completion of the project, to issue the necessary certificates (certificate of practical completion, certificate of making good defects and final certificate) and finally, after applying and receiving the *surat sokongan* from the Council, to issue the certificate of compliance and completion. During cross-examination, she agreed that the above answers were not relevant in this case where the Casa Vinca Apartments had sustained damage.

[62] In the present case, DW1 was involved in *post* construction only. She was appointed by McLarens to review the structural work of a project known as the Casa Vinca Apartments after two blocks were damaged due to a landslide. She was instructed to conduct a survey and to report on the structural work.

[63] DW1 testified that as the project involved post-construction work, there was no need for her to prepare any plans. *She neither submitted plans for approval of the remedial works nor was there planning approval of the remedial works*. Her terms of appointment were confined to reporting on whether the repairs to the architectural work were satisfactorily done. In order to determine this, she conducted a site inspection on 20 July 2004 which was attended by the adjusters, consulting engineers and contractors. She told the court that she focused on the architectural aspects such as the painting, tiles, ceiling, roof tiles, etc. Upon inspection, she was satisfied that all aspects of the architectural work completed by the contractor were satisfactorily done. As such, she issued a certificate of practical completion (C2 – p 414) on 22 July 2004. She also issued a letter of confirmation to MPL that the work had been completed (p 412). During cross-examination, she confirmed that *her certification at p 414 would be in respect of the cosmetic part of the works only* and would have nothing to do with the structural side of it.

[64] During cross-examination, DW1 agreed that she was not a qualified engineer to comment on structure. She confirmed that CH Perunding was the consulting civil and structural engineers who were appointed by McLarens and they would be qualified to give comments on structure. She agreed that she was appointed only two months after CH Perunding had commenced remedial work at the site. By the time she was appointed, the structural works had been completed and concealed. She was thus unable to comment if the damage to the structure was serious.

[65] *Cheah Chin Huat (DW2)* is a practicing consulting engineer practicing under the name and style of Jurutera CH Perunding. He started practice soon after obtaining a degree in Bachelor of Science Engineering from University College, London in 1980.

[66] DW2 testified that the duties of a consulting engineer appointed for a building project would include preparation of design drawings and plans for all structural and civil works which would eventually be relied upon by the contractors for the construction. In a typical construction project involving buildings, he would normally submit his drawings/designs to the local authority. These designs/drawings would form part of the documents for the contractors to submit their quotations during the tender process. Once the work commences, he would supervise the contractors and conduct site inspections to ensure that the work was being properly carried out. On the question of whether normal engineering practice would need to be followed, he offered the answer that normal engineering practice need not be followed where a more specialist practice is required.

[67] DW2 was appointed by McLarens to handle the rectification of damage to a completed housing project comprising three blocks of a four storey apartments and one block of two storey apartments at Pokok Asam in Langkawi. Certain portions of two blocks had sustained damage following a landslide. He was unable to state when he was appointed.

[68] According to DW2, he first conducted a careful inspection to assess whether the damage could be repaired. From his observations, only a few main structural elements were affected and the damage was not so extensive so as to render them irreparable. He told the court that he was satisfied that the damage could be repaired and the buildings restored to their condition before the damage. He expressed this opinion at a meeting on 18 February 2004 and this was reflected in the minutes of the meeting ('P7'). However during cross-examination, he had to agree that at the meeting on 18 February 2004, he did not produce any soil tests or core test results in support of his opinion.

[69] DW2 duly advised McLarens and expressed his views as to how the repairs would be carried out. His proposal was to remove certain structural columns, beams and slabs in the damaged location and to reconstruct them. He proposed to install I-beams to provide stronger support. His proposals can be seen at pp 294–297 of C1. DW2 explained that the reinforced steel content is higher in the I-beam than in the original design. Thus, using the H column will make the structure stronger and better. His proposals were accepted by the adjusters and he proceeded to prepare design drawings which were submitted to the adjusters.

[70] DW2 testified that he did consider the option of demolishing and then reconstructing the building but found it not to be a viable option. He was aware that Jurutera Perunding, the plaintiffs' consulting engineers, was of the view that the affected blocks should be demolished and re-built. He disagreed with their view because out of a total of 80 columns in each block, only 8–9 columns were affected and this only represented about 10% of the total. Further although the affected columns were fairly important structures for support, all the other columns were intact and as such there was 'no great danger of collapsing'.

[71] Re the retaining wall, DW2 testified that in his professional opinion, the wall was 'abjectly inadequate and defective'. When considering Jurutera Perunding's report, he had carefully assessed all aspects of the retaining wall by checking the drawings. He claimed to have come up with calculations and compared them with the British Standard Code of Practice which has been adopted by the industry in Malaysia and concluded that the retaining wall fell far short of the standard. He disagreed that his application of the British Code was incorrect.

[72] On 18 February 2004, he attended a meeting called by MPL to discuss the retaining wall as the landslide had interfered with public access around that area. Among those present were MPL's officers, Perunding's consultant, McLarens and representatives of the first plaintiff. MPL wanted the repair work to be started immediately. DW2 pointed out that the result of his comparative study of the strength of the retaining wall and the British Code of Practice showed that the retaining wall was below standard. This evoked an aggressive response from the plaintiffs' representatives. DW2's response was that to be completely satisfied that the retaining wall was adequate, an inspection and concrete test would have to be carried out.

[73] During cross-examination, DW2 admitted that at the time of this meeting, he was aware that there was a demolition order issued by MPL although he claimed he did not have actual sight of the said letter.

[74] DW2 testified that he carried out a physical measurement of the dimensions at site. This gave him actual dimensions. He did not take samples of the concrete but he took photographs. He testified that it was he who had requested for the core tests, monitored the carrying out of the core test and also witnessed the coring and subsequently the testing of the core. The core samples taken had to be soaked for two weeks before the testing. It is his evidence that the concrete core test carried out by the developers to test the strength of the concrete revealed that they were inadequate. He duly wrote to McLarens on 30 April 2004 to inform them about his findings (p 380 of C1). He also wrote to MPL on 21 May 2004 to inform them that the slope and the retaining wall at the site were unsafe (p 383). *It is relevant to note that DW2 was unable to produce the results of the core tests when asked to do so and as such the results of the core tests are not before the court*.

[75] DW2 testified that upon realising that the retaining wall had failed the concrete core test, he agreed to handle the project for the rectification of the two blocks that were damaged by the landslide but *excluding the retaining wall*.

[76] McLarens appointed Langkawi Multiple Works as the contractor for the project. DW2 provided the design drawings and plans and drew up a method statement for Langkawi Multiple Works to carry out the repair works. Apart from that, DW2 also supervised and carried out inspections to ensure that the work was done to his satisfaction.

[77] During cross-examination, DW2 was questioned at length as regards the preparation of design drawings, plans and specifications for the structure of the building. Whilst insisting that he had indeed prepared the said drawings and forwarded the same to MPL before commencement of the rectification works, he was unable to produce any proof of this. However *he agreed that he*

had neither given a copy of the design drawings etc to the plaintiff nor had he obtained planning approval to commence work at the site.

[78] The contractors completed their work in July 2004 and keys were handed over at a site meeting on 20 July 2004. DW2 testified that he carried out further inspections and was satisfied that the work was properly and satisfactorily completed although he did not certify the fitness of the buildings after the repair works were completed. Both the architect as well as McLarens was present at the meeting and inspection.

[79] On 22 July 2004, DW2 wrote to the defendant to certify that the work had reached the stage of practical completion (p 409). He also wrote to MPL to inform that the work had been completed (p 410). In both the certificate as well as his letter, *he did not certify that the building was restored to its original condition nor did he state that it was safe for occupation. He admitted not having obtained the approval from the Town Council after the repair work was completed* and offered the explanation that approval was not necessary. He agreed that his certificate was not in accordance with by-law 25(1) of the Uniform Building By-Laws 1984 ('UBB 1984') but claimed that the by-laws did not apply to rectification works. He did not agree that non-submission of plans and failure to get approval from the authorities for the building plans was an infringement of the SDBD 1974.

[80] DW2 disputed that the demolition order was still effective today. When asked how he knew that it was no longer in effect, he gave the following answer: '*Because when I submit my letter on page 410 to MPL, they never comment or take action*'.

The question arises whether the lack of response from MPL, even if true, could have the effect of rendering the demolition order ineffective. DW2 further testified that when he consulted with MPL, they had told him that all he had to do was to certify that the building is safe. When DW2 was asked to read MPL's letter dated 23 November 2003 ('P11'), he first claimed that he could not understand Bahasa Melayu very well. However when the contents of the letter was interpreted to him, he agreed that vide this letter, it would appear that the demolition order had never been withdrawn.

[81] With reference to the plaintiffs' complaint letter about the repair works dated 17 June 2004, DW2's response was that his principal was the defendant. He had no contact with the plaintiffs who had 'no business to interfere with our work'. He claimed to have carried out all necessary surveys, implemented all safety measures and done everything necessary and appropriate in the prevailing circumstances and having regard to the nature of the job. There was no untoward incident from commencement to completion of the project.

There is no complaint from MPL or suggestion from any party that the building was structurally unfit or unsound.

[82] During cross-examination, DW2 confirmed that his appointment was to reinstate the structure to its original state. He however agreed that he had deviated from the original plans. He agreed that he had used I-beam columns instead of reinforced concrete columns and that there was a complaint from first plaintiff about this. Whilst agreeing that his use of steel H-column I-beam with simple bolt end connections to replace the reinforced concrete columns had altered the overall design concept of the whole building, he denied that this alteration would weaken the structure of the property and render the building unsafe. Instead, he contends that the alteration made the building more stable. When referred to the independent report ('P1') by Tham Kum Weng ('PW1') and his concerns about building stability as at para 9.2(a)–(d), DW2 agreed with para (a) that due engineering process as per normal professional engineering practice appeared not to have been followed. However, he disagreed with paras (b) and (c) in relation to the lack of specification or documentation for the remedial works materials or the alleged weaknesses in the steel H-column ends connections.

[83] The court notes that when DW2 was referred to the Core Tests Results by Sealand Drillers ('P17'), the report on the retaining wall (p 580) and the Geotechnical Report by Jurutera Perunding Wawasan, he claimed not to have seen those reports before. However, he disagreed with the conclusions found in the reports or that the landslide and consequently the damage to the structure were caused by the rain and not by the collapse of the retaining wall.

[84] Tan Keng San ('DW3') described himself as a building contractor. Having worked in construction sites since the age of 15 years, by the age of 21 he had his own building contract business obtaining jobs through sub-contracts.

[85] DW3 testified that he was approached by Cheah Chin Huat (DW2) to carry out rectification work on the first plaintiff's project. The work was obtained in April 2004 under Langkawi Multiple Works, his son-in-law's company. DW3 is not a partner in Langkawi Multiple Works.

[86] The project commenced in April 2004 and involved the rectification of two blocks of four storey apartments. There was extensive damage with collapse of walls and major columns following a landslide. An existing retaining wall had also collapsed due to the landslide and the debris had surged through to impact on the building.

[87] DW3 mobilised a team of more than ten workmen to carry out the rectification work. He first prevented further damage by taking steps to avoid collapse. Acting on the instructions of the consultants, he used I-beams to prop up the beams to avoid potential collapse. During cross-examination, he agreed that he was not qualified to say if the use of the I-beams would constitute a better support for propping up the beams.

[88] DW3 testified that the rectification work was carried out in accordance with the engineer's plan as drawn up and provided by the consultant. The rectification works included structural work to reconstruct the columns and walls as well as repairs to electrical and plumbing works. All damaged parts had to be repaired and restored to the condition that they were in before the damage. DW3 said that Mr Loong, a representative of the first plaintiff assigned to be on site, would point out works which were allegedly not satisfactorily done and all issues raised were dealt with.

[89] Work was completed within three months. He attended an inspection on 20 July 2004 with the architect and consultant present. They confirmed that the work was satisfactorily done. Keys were handed over to the adjusters on 21 July 2004. A certificate of practical completion was issued on 22 July 2004. The cost of the entire project was about RM300,000.

[90] Jayapragash Amblavanar (DW4), an assistant genaral manager in the claim department of the defendant, testified that the plaintiffs' claim was under Standart Fire (Class 1) Policy No 03FPJ002862 for damage to the property known as the Casa Vinca Apartment in Langkawi. Individual certificate of insurance were issued to denote the individual interests of the owner of each unit. He confirmed that the insurance cover was under the said master policy. If there was damage to an insured unit and the unit is covered by the policy terms, the defendant would have to look at the respective claims to see the interests of the respective owners. 'The Insured' as described in the policy document is 'MAXI DEVELOPMENT SDN BD, THE RESPECTIVE OWNER AND THE BANKERS AND FINANCIERS — FTRR &N I'.

[91] After the claim was intimated by the agents in October 2004, DW 4 instructed McLarens, their loss adjusters, to conduct investigations. Of particular importance was a letter from MPL to the first plaintiff to demolish and rebuild the end units of Blocks B and C whereas under cl 16 of the policy, the defendant as insurer had the option to reinstate or replace the damaged property. Based on MPL's letter dated 23 November 2003 (P11), DW4 agreed that MPL had never withdrawn their demolition order. *He agreed that cl 16 cannot override MPL's demolition order*. When asked how it was possible for the defendant to carry out repair works if there was a demolition order, DW4 explained that following the issuance of the demolition order, the defendant

had instructed the adjusters, the insured and the consultants to meet up with MPL. After the meeting, they were advised by the adjusters that MPL had stated that if the insurers, consultants and contractors can meet the basic requirements to reinstate the building and ensure that safety be given serious consideration, then MPL has no objections to their carrying out repairs.

[92] After discussing the issue with McLarens, DW4 decided to retain a consulting engineer to conduct the necessary investigations and to advice on the best option available under the insurance contract. Cheah Chin Huat (DW2) from CH Perunding, appointed as consulting engineer in December 2003, duly conducted investigations and confirmed that the damaged property could be repaired without demolition.

[93] The option of repairing the building was acceptable to the defendant provided MPL had no objections. After meetings were held with MPL on 14 January 2004 and 18 February 2004, McLarens reported to DW4 that MPL was prepared to allow them to undertake repairs but that it was necessary for their consultant to carry out further investigations, including soil investigations, at the slope failure area. On McLarens' advice, DW4 appointed a geotechnic firm, UD Geotechnics Sdn Bhd, to conduct the soil investigation. It was unfortunate that the first plaintiff did not allow the testing. The reason for this, as stated in their letter dated 16 March 2004 ('P8'), was because there were still disagreements between the parties on the issue of the retaining wall.

[94] When DW4 was referred during cross-examination to cll C and D of the draft minutes of the 18 February 2004 meeting ('P7'), he agreed that MPL was only *considering* pulling back the demolition order subject to conditions. He agreed that even if MPL were to withdraw the demolition order, there must be compliance with relevant provisions of laws and by-laws and proper submission of plans and calculations. He admitted that he was not aware if any plans at all had been submitted to MPL, having left everything to the adjusters and consultants.

[95] According to DW4, the first plaintiff had written on 25 February 2004 to confirm their agreement to the defendant's proposal to repair the affected units without demolishing them ('P8'), but subject to a set of conditions. The defendant considered most of the conditions acceptable except for a few items. A meeting held on 9 March 2004 to discuss the project, including the first plaintiff's conditions, was attended by DW4 together with Mr Horst Habbig, the then CEO, and Mr Eric Lim, the claims manager. The draft minutes of the meeting ('P9') shows that the first plaintiff's letter and conditions were discussed and records that the defendant disagreed with the first condition and was of the view that certification that work had been satisfactorily completed

should be from an independent architect and not the owner. The defendant had also disagreed with the proposal for compensation of RM3,000 per day for delay.

[96] Following further discussion on 11 March 2004, the defendant wrote to the first plaintiff on 22 March 2004 (p 367) for confirmation of the terms under which they were to carry out the repair works. The said terms were confirmed.

[97] Langkawi Multiple Works were appointed on 7 April 2004 as the contractor to carry out the repair works. Upon completion of the works, the consulting engineer sent a letter dated 21 July 2004 (p 409) to the defendant to certify that the works had reached a stage of practical completion. It also informed MPL about the completion of the repair works (pge 410). Vide a letter dated 22 July 2004, Nathan-Jones wrote to MPL to certify that the damaged units had been repaired to their original condition ('telah dipulihkan kepada keadaan asalnya') and that the work was satisfactory (p 412). A certificate of practical completion (architectural finishes) addressed to the contractor (p 414) was also issued by Nathan-Jones.

[98] After the work was completed, the defendant appointed another firm of consulting engineers, Anhance Consultancy, to carry out a survey to confirm that the work had been satisfactorily completed. The report of Anhance Consultancy appears at p 415 of C2. The keys of the property were handed over to the first plaintiff by the defendant on 3 August 2004.

[99] Numerous questions were asked during cross-examination as regards the first plaintiff's many requests for documents. Vide a letter dated 26 April 2004 (p 103), the first plaintiff stated, inter alia, that they were still waiting for the method statement. From the contents of another letter dated 17 June 2004 (p 109), it can be observed that the first plaintiff was still awaiting the following documents:

(a) detailed design calculations;

(b) drawings showing all construction details;

(c) bill of quantities;

(d) specifications/method statements;

(e) safety procedures; and

(f) workmanship and quality control procedures.

In a letter dated 28 July 2004 (p 114), the first plaintiff informed the defendant that they had yet to receive the damage assessment report, repair method statements and survey records. A letter from Filbin Marine Sdn Bhd dated 9

August 2004 (p 115) puts on record that they cannot recall ever saying that they did not require the damage assessment report, repair method statements and survey records but that on the contrary, they had written to request for the said documents on 28 July 2004. Following this, DW4 signed a letter dated 28 July 2004 (p 424) wherein he alludes to an agreement that 'there will be no requirement for the damage assessment report, repair method statements and survey records'. The first plaintiff responded with yet another letter dated 13 August 2004 (p 116) 'vehemently' denying that they had agreed that the afore stated documents were not required. It also acidly states that 'unless the parties concerned have something to hide, these documents should readily be made available especially to us, as your insured upon request'. The first plaintiff's letter dated 30 August 2004 (p 117) again records that those same documents requested earlier had still not been given. Paragraph 3 of the letter dated 6 October 2004 from Messrs KF Low & Co (pp 118–120) reiterates that documents requested by the plaintiffs had yet to be provided. From the above recounting, *DW4 was compelled to agree that even as at 6 October 2004, documents requested were still not supplied by the defendant*. It was only on 9 November 2004 that the defendant, through their solicitors, responded by saying that the plaintiffs had no contractual right to the documents that they demanded and that the documents would therefore not be provided.

[100] The defendant's final witness is *Moh Weng Wah* (DW5), the General Manager of McLarens Saksama, the loss adjusters of the defendant with 31 years' experience in the loss adjusting business. McLarens were appointed in early October 2003 to deal with the first defendant's claim in relation to the damage caused to certain units in Blocks B and C of the Casa Vinca Apartments in Langkawi due to landslide.

[101] As the matter involved damage to buildings, McLarens, with the consent of the defendant insurer, appointed Cheah Chin Huat (DW2) of CH Perunding as the consulting engineer. DW2's report, after conducting investigations, appears at p 294 of C1.

[102] After the first plaintiff's claim, together with two quotations for demolition and reinstatement of the affected property, was received on 29 December 2003 McLarens wrote back to inform that their appointed consultant was of the view that the damage to the property could be repaired without first demolishing the affected blocks. As such, McLarens was interested in a meeting with MPL which had issued a demolition order. A meeting was held on 18 February 2004 with minutes recorded by Chong Boon Leong. According to DW5, the draft minutes ('P7') accurately reflects the discussions held during the meeting.

[103] The main issue discussed during the meeting was the proposal to carry out repairs without demolishing the affected blocks. According to DW5, MPL was receptive to the proposal but wanted soil tests to be carried out first to ensure that the location, especially the retaining wall, was safe for work. He testified that neither the first plaintiff nor his consultant objected to the proposal. Following this meeting, McLarens appointed UD Geotechnics to carry out soil tests. Initially, the first plaintiff did not allow UD Geotechnics to carry out the soil tests although the tests were eventually done. DW5 disputed para 2 of the first plaintiff's letter dated 16 March 2004 ('P8') and claimed that what was stated therein about an agreement to hold on any further action until further discussion was untrue.

[104] On 25 February 2004, the first plaintiff wrote to the defendant ('P8') setting out conditions for the work to be done. DW5 corroborated the evidence of DW4 when he testified that not all the first plaintiff's conditions were accepted. Among the conditions that were of concern was a condition that the work must be to the satisfaction not only of the architect but also of the owner. DW5 considered this condition to be undesirable because the first plaintiff was clearly not objective. He took the view that the work should be certified by an independent architect. Another proposed condition not agreed to was the RM3,000 compensation per day for delay in completion.

[105] After another meeting was held on 9 March 2004 to address these issues, the rectification works were carried out by Langkawi Multiple Works, the contractor appointed by McLarens for that purpose. DW5 confirmed that the terms of agreement between the parties on the repair work are as stated in the first paragraph as well as the conditions enumerated in the defendant's letter dated 22 March 2004 (pp 367–368).

[106] Under the terms of agreement, an architect would be selected to supervise the repair works '*and to supervise the fitness of these buildings after the said repair works including obtaining approval from the Town Council*'. Nathan-Jones Architect was only appointed on 7 June 2004 or later, more than two months after the repair work had commenced. DW5 admitted that Nathan-Jones could not have supervised the repair work from April as they were not yet appointed then. It was put to him and *he agreed that the terms of the letter at p 367 had not been complied with as there was no proper supervision by the architect*.

[107] Work commenced in early April 2004 and was completed on or about 16 July 2004, five weeks after the architect was appointed. A certificate was issued by Nathan-Jones to MPL on 22 July 2004 (p 412) confirming that the work had been satisfactorily completed and that the units had been reinstated to their original condition. A certificate of practical completion (architectural

finishes) addressed to the contractor was also issued on the same date. During cross-examination, DW5 at first agreed that the certificate was wrong because Nathan-Jones did not supervise the repair work from April-May although he subsequently retracted this evidence. CH Perunding, as the consultant engineer, also issued a letter to MPL confirming that the work had been completed, assumed all responsibility for the work and submitted the building plans for the repair work. It was pointed out that there is no evidence of acknowledgment of receipt of this letter by MPL. Neither were the plans, allegedly attached to the said letter to MPL, produced before the court. DW5 admitted that he did not know whether CH Perunding had to obtain a certificate of occupational fitness for the affected units after the repair works had been completed.

[108] The court notes that during re-examination, DW5 took the stand that CH Perunding carried out the supervision work for the repairs to the building structure whereas Nathan-Jones supervised the architectural finishes, that is, the non-structural items such as floor finishes, doors, windows and such other architectural finishes which were not structural works. He explained that it was not necessary to appoint an architect in April-May because the architectural finishes had not started yet.

[109] DW5 testified that after the repair works were completed, they instructed another consultant, Anhance Consultancy, to provide a second opinion. Their scope of work was to carry out a physical inspection and to have detailed discussions with CH Perunding on the type of work that they had carried out. After discussions and a site inspection, Anhance issued a report dated 22 July 2004 confirming that the work had been completed satisfactorily. DW5 disagreed with the suggestion that Anhance cannot comment on whether the structure was sound or otherwise without supporting evidence. He was of the view that physical inspection and discussions with engineers are enough.

[110] In the course of the repair works an issue arose as regards the retaining wall. There were also constant complaints made by the first plaintiff. It is DW5's evidence that these issues had been addressed and responded to by them and CH Perunding.

[111] DW5 identified pp 429–445 as the final report from McLarens dated 21 September 2004. During cross-examination, DW5 was referred to p 435 of his report and he agreed that the cause of the damage was the landslide and the cause of the landslide was the exceptionally heavy rainfall. He agreed that nothing in his report indicated that the landslide was due to the improper design of the retaining wall.

A EVALUATION OF THE EVIDENCE AND FINDINGS

[112] In coming to a decision in this case, the court has carefully considered the voluminous notes of evidence recorded as well as the equally voluminous documentary evidence relied on by the parties. The court will endeavour to deal with each of the broad issues raised in turn.

The Master Fire Policy and other policies

[113] The plaintiffs have filed their claim under Master Fire Policy No 03FPJ002862 which covers the property described as 'On 3 Blocks of 4 Storey Buildings, Excluding Foundation, Inclusive 'Outbuilding, Wall and Fencing'. The statement of claim filed by the plaintiffs makes mention of this policy and no other.

[114] The defendant has pleaded in paraph 3.2 of their defence that they do not admit the second, third, fourth or fifth plaintiffs are covered by the policy. Their argument is that the master policy was issued to cover the project and that individual policies were issued after the units were sold to individual buyers. The defendant submits that on the issue of insurable interests, only the party which has an interest in the property is entitled to the claim. Whilst admitting that it had a contractual duty to the first plaintiff to comply with obligations under the policy, the defendant contends that it owes no duty to the plaintiffs or any of them whether in contract, tort of otherwise (para 10.1).

[115] The court has carefully examined the various documents in question. The Master Policy No is 03FPJ002862 and the 'Insured' under the said policy is described as 'Maxi Development Sdn Bhd, the respective owners and the Bankers & Financiers FTRRF'. The term FTRRF means for their respective rights and interests.

[116] The court notes that while it is true that individual policies have indeed been issued to individual owners, those policies still carried the master policy No with the addition of an '*' and a few more digits. Thus the policy number of the second plaintiff is 02FPJ002862*0024, that of the third plaintiff is No 02FPJ002862*0030, the policy number of the fourth plaintiff is 02FPJ002862*0089 and that of the fifth plaintiff is 02FPJ002862*0035. The court notes that although individual policies were issued, there was no separate assignment of amounts of coverage. The individual policies in fact certify that a master policy had been effected and although the situation of risk is given as the individual unit in question, the only indication of the amount of insurance cross-refers back to the RM7m insured under the master policy. The perils

covered under the individual policies are the same as that in the master policy and in fact are described as 'subject to the conditions, exceptions, warranties and clauses on the Master Policy'.

[117] In light of these facts, the court is unable to agree with the defendant's argument that the individual owners must sue under their own policies. Unlike in the case of landed property, insurance policies for strata owners are irretrievably linked to the master policy even after individual policies are issued. Damage to the lower floors which involves repairs and reinstatement of the foundation will irretrievably affect and benefit the upper floors. It is in light of these factors that the court finds that the claim of the plaintiffs under the master policy is not unacceptable. Although the first plaintiff is not claiming on behalf of the other four plaintiffs, the court finds that in the overall context of the damage sustained, the claim of the plaintiffs as set out in para 32 of the statement of claim can only be read as the total of the claims of all the plaintiffs collectively and not the claim of each and every one of the plaintiffs.

Was there damage to units B-2-6, B-3-6, C-2-8 and C-3-8?

[118] The next issue to be considered is whether units B-2-6, B-3-6, C-2-8 and C-3-8 were damaged as a result of the landslide at the affected building. The plaintiff relies on the evidence of *Chong Soo Phin* (PW6) of Jurutera Perunding SPC who prepared the report P6. The court notes his qualifications and experience. As the civil & structural consulting engineer who designed the Casa Vinca Apartments and supervised its construction from start until completion, his evidence as to the damage that occurred at the said apartments must be given due weight.

[119] The court has carefully examined what PW6 has said in P6 about units B-2-6, B-3-6, C-2-8 and C-3-8. In summary, he notes that as far as Block B is concerned, the landslide 'affected the corner units no. B-G-6 at ground floor and B-1-6 at first floor' with the ground floor unit B-G-6 being badly damaged. The three columns at B-G-6 were broken, displaced and cracked. Earth had pushed inside the ground floor unit at B-G-6 and part of the first floor unit B-1-6. In respect of Block C, there were major cracks and displacement of the wall and the columns at unit C-G-8 where earth from the landslide had reached the first floor at unit C-1-8. The columns at the edge of the building had been displaced at C-G-8.

[120] It is noted that there is no specific mention of damage to units B-2-6, B-3-6, C-2-8 and C-3-8 in P6. Mention of these units appears in PW6's recommendation when he suggests that 'the affected units of Block B (B-6) and Block C (C-8) be demolished *for all floors and rebuilt*. The building foundations must be examined to see whether they had been damaged by the

landslide and where necessary, they should be rebuilt'. The court finds that in light of the damage to the ground floor and possibly to the foundation, any recommendation for demolishing and rebuilding B-G-6 and C-G-8 would naturally affect the upper floors of those units.

[121] Other evidence as to the damage to Units B-2-6, B-3-6, C-2-8 and C-3-8 comes from *Hoo Hee Yong @ Hok Chi Yong (PW2)* when he testified that the spilled earth from the landslide had reached the *second floor of Block B* and the first floor of Block C and caused damage to the RC retaining wall of the slope as well as substantial building damage to the end of Blocks B and C. The landslide caused damage to the columns and slab beams or foundation structure, walls, windows and doors of units B-1-6, *B-2-6, B-3-6*, C-1-8, *C-2-8 and C-3-8*.

[122] Thus, although there is not much evidence as to the actual damage to units B-2-6, B-3-6, C-2-8 and C-3-8, in light of the foregoing evidence, the court finds that there was damage to or at the very least consequential damage to the said units by virtue of damage to the foundation structure of the ground and first floors of B-6 and C-8. Any demolition or repairs to the foundation structure as well as beams, columns and slabs at the ground floors of Blocks B and C would necessarily involve the upper floors of those two blocks.

Was MPL's demolition order revoked on 18 February 2004?

[123] Although it does not appear in the list of agreed facts, the court finds that there is no doubt that MPL had in fact issued a demolition order or notice dated 23 December 2003 in respect of the end units of Blocks B and C. This would involve the demolition of units B-G-6, B-1-6, B-2-6, B-3-6, C-G-8, C-1-8, C-2-8 and C-3-8.

[124] The court notes that evidence was adduced to the effect that when requests for damage assessment reports, repair method statements, survey records and construction drawings were not acceded to, Messrs KF Low & Co wrote to the defendant on behalf of the plaintiffs to request for the said documents. The response, through Messrs TH Liew & Partners, was that MPL had withdrawn the demolition notice of 23 December 2003 on 18 February 2004 'and accepted that reinstatement works were an appropriate way to deal with the matter' (p 121).

[125] The court finds that the contents of Messrs TH Liew & Partners' letter in respect of the withdrawal of the demolition notice to be inaccurate and incorrect. It is the court's finding that MPL had never withdrawn the demolition notice as evidenced by their letter dated 23 November 2003 ('P11') in which they had categorically stated that:

arahan meroboh masih berkuatkuasa dan tidak pernah menarik balik arahan tersebut kecuali setelah cadangan baikpulih dipersetujui oleh semua pihak dan diperakui selamat oleh Jurutera Perunding yang bertauliah. Pihak Majlis juga tidak menerima sebarang permohonan untuk kelulusan bagi kerja-kerja baikpulih untuk blok-blok yang terlibat. (Emphasis added.)

[126] What is the significance of the date 18 February 2004 given by Messrs TH Liew & Partners as the date of withdrawal of the demolition order? 18 February 2004 is the date of the meeting held at the Langkawi Municipal Council's office chaired by the Deputy President of MPL. It was attended by the first plaintiff, Jurutera Perunding, CH Perunding, MPL's engineer as well as McLarens, the defendant's loss adjusters. The court has carefully examined the minutes to decipher whether the demolition order had been revoked by MPL at the said meeting notwithstanding their protests that the order was still in force.

[127] The court notes that the use of phrases such as '... *willing to* retract his earlier order letter instructing the Insured to demolish the affected apartments...' and '... *willing to consider* pulling back the demolition order ...' and '... *does not think that it is safe to be rectified* and therefore *the affected building has to be demolished entirely* ...' on the part of the officers of MPL would point to there being no retraction of the demolition order on that date. At best, MPL was saying that they were prepared to consider retracting the demolition order provided that a guarantee can be given that the property could be safely repaired and that the protection and safety of the public interest would be given paramount consideration.

[128] The court further notes that the minutes of the meeting did not record that any guarantee was given to MPL that the property could in fact be safely repaired. From the discussions, it would appear that the retaining wall had to be rectified before the repair works could be carried out. A dispute arose over whether the retaining wall was below the minimum requirement of the British Standard Code of Practice (BSCP). The views and comments of Ir Cheah Chin Huat of CH Perunding (DW2) that the wall was below the minimum standard drew unhappiness and dissent from Ir Chong Soo Phin from Jurutera SPC (PW6). Although a suggestion was made that Ir Cheah take over responsibility of the site, he was only willing to do so subject to his satisfaction over the test that he would carry out in relation to the retaining wall. However, right up until the close of the meeting, Mr Hoo Hee Yong from the first plaintiff had refused to provide the soil test.

[129] As such, looking at the minutes of the meeting on 18 February 2004, the court finds that there was in fact no retraction or revocation of the demolition order on that date. Neither were there any points of agreement

between the parties from which it could be concluded that an agreement had been reached on the way forward from which the defendant could presume or infer that there was such a revocation. The court's finding in this regard is borne out by the MPL letter dated 23 November 2003 (P11) denying any revocation or retraction of the demolition order. In any event the defendant has not been able to produce any document by MPL to evidence the revocation of the demolition order.

Was there consensus to repair/reinstate without demolition?

[130] The court finds that there was subsequently an agreement *of sorts* between the parties in an attempt to get out of the impasse. Since the defendant was insisting on repairing the affected units without demolition, the plaintiffs wrote a letter dated 25 February 2004 (P8) agreeing with the suggestion to repair but subject to 14 conditions. Among the conditions was the requirement to comply with all relevant written laws — rules, orders, regulations or bylaws — in relation to the repair works.

[131] The court notes that a meeting was held on 9 March 2004 when the first plaintiff's conditions were discussed and changes agreed upon. Among the changes was that the repair works should be carried out to the reasonable satisfaction of the architect. Subsequently on 16 March 2004, the first plaintiff wrote to confirm that the defendant could commence the repair works provided that all safety precautions and requirements were met. However, that same letter still raised points of disagreement pertaining to the retaining wall.

[132] The court thus finds that notwithstanding the demolition order by MPL, there was an agreement between the parties that the defendant could reinstate the affected units without demolition. However, it cannot be over emphasised that this agreement was subject to conditions. The effect of non-compliance with the conditions of the agreement in relation to the demolition order and the agreement itself will be dealt with in due course.

Option to reinstate

[133] It cannot be disputed that vide cl 16 of the policy document, the insurers had the option to 'reinstate or replace the property damaged or destroyed, or any part thereof, instead of paying the amount of the loss or damage'. The court has no issue with the authorities cited by learned counsel for the defendant on the defendant's right to election (*The Times Fire Insurance Co v Hawke* (1858) 1 F & F 406; *General Principles of Insurance Law* by ER Hardy Ivamy). The court is of the view that the defendant would have been perfectly entitled to elect to reinstate or replace the damaged property if there was no demolition order issued by MPL in respect of the end units of Blocks B

and C. However, with a demolition order in force, the defendant's right to election, at best, becomes conditional. The court is unable to agree with the submissions of learned counsel for the defendant that after the meeting of 18 February 2004, the defendant had been given approval to carry out repairs. There was clearly no such approval. Subsequent meetings and discussions between the parties, albeit subsequent agreements between the parties to repair the affected apartments fell short of a revocation of the demolition order by MPL.

[134] On this issue, the court thus finds that the defendant's option to elect to reinstate is rendered ineffective and inapplicable because of the demolition order. At best, the agreement between the parties to repair the affected units only suspends the demolition order. Had the defendants succeeded in reinstating the premises whilst complying with all the conditions agreed to between the parties, they would have been able to apply to MPL for the revocation of the demolition order in due course.

Were the repairs properly done?

The Street, Drainage and Building Act 1974 and the Uniform Building By-Laws 1984

[135] The court will now consider whether the decision of the defendants to repair the said units and the method of repairing the said units was illegal and contrary to law.

[136] The plaintiff has drawn the court's attention to s 83(1) of the Street, Drainage and Building Act 1974 ('SDBA 1974') which empowers the local authority to serve notice on the owner of any building which is in a ruinous state or is likely to fall or is in any way dangerous to either repair the defects or demolish the building. In the instant case, MPL despite having an option of only ordering repairs to be made to the affected apartments had ordered them to be demolished. The court finds that MPL must have had a good reason to decide on an order of demolition.

[137] *Section 83(3) of the SDBA 1974* goes on to provide as follows:

> (3) If upon service of the notice the owner *desires to repair*, he *shall not proceed to do so unless he has obtained planning approval* to do so *from the relevant authority* in charge of town and country planning in the area where his building is situate.
>
> (4) Where planning approval has been granted, the owner *shall not proceed to repair unless* he *has submitted* such *plans and specifications* showing the intended repairs and *until such plans and specifications have been approved* by the local authority.

[138] Reference was made by the plaintiffs to the provisions of the Uniform Building By-Laws 1984 ('UBB 1984'). The plaintiffs argue that the word 'Act' under the UBB 1984 refers to the SDBA 1974 and that the SDBA 1974 and the UBB 1984 must be read together. The plaintiffs submits that where repair works are being carried out on the affected units despite there being a demolition order, the defendant's consultant engineer who has undertaken the responsibility to repair the affected units would have to apply and obtain planning approval from MPL. Where planning approval has been granted, the repair works shall not be proceeded with until plans and specifications showing the intended repairs had been submitted to and approved by MPL. Reference was made to by-law 3(2) pertaining to the submission of plans by a qualified person and by-law 25 on the issuance of a certificate of fitness for occupation which were not complied with by the defendant.

[139] The plaintiffs further submit that s 83 of the SDBA 1974 clearly represents the intention of Parliament that the provisions of the Act have to be strictly complied with when dealing with ruinous or structurally unsafe buildings. Public interests require that the safety not only of the occupants but also the workers carrying out the works has to be strictly considered. The plaintiffs complained that both DW1 and DW2 had candidly admitted that no planning approval as required under s 83(3) of the SDBA 1974 was obtained from MPL. Neither were plans or specifications showing the intended repairs as required under s 83(4) submitted for approval.

[140] The court notes the defendant's submissions that by-laws 3 and 25 do not apply in the instant case as they only applied to new buildings and not to repairs to existing buildings. Learned counsel submitted that s 70 of the SDBA 1974 relied on by the plaintiff is actually the legislative regime applicable to new buildings and hence the plaintiffs reliance on the two provisions were misconceived.

[141] The defendant's position is that their consulting engineer had given notice to MPL that they were commencing repair works. The consulting engineer had allegedly consulted with MPL who had apparently informed them that there was no need to submit documents. Learned counsel submitted that they were '*attempting* to comply with section 83(3) & 83(4)'.

[142] On this issue, the court finds that the clear provisions of s 83(1), 83(3) and 83(4) of the SDBA 1974 were applicable in the instant case. The court is of the view that the words '*in addition to* the requirements of section 70 of the Act' in by-law 3(1) of the UBB 1984 does not render the by-law only applicable to new buildings. The court agrees with the submissions of learned counsel for the plaintiff that the afore mentioned provisions were designed especially to cover just such a case as the failure of the affected units. MPL, in exercise of

their powers under the SDBA 1974 was satisfied that the affected units were in a dangerous condition and hence issued the demolition notice. Once the notice was issued and not revoked, there should be strict reliance with its provisions to ensure the safety of the occupants as well as the public. The court finds that 'attempting to comply' on the part of the defendant's contractors does not equate with compliance. Since the building was insured with the defendant and the defendant had decided on the path of repairing the affected units, it was incumbent upon them and their appointed consulting engineers and contractors to apply for the requisite approvals and to submit all necessary plans. Since this was not done, the court finds that the defendant was guilty of non-compliance with relevant laws and by-laws. And by their non-compliance the defendants were in breach of the conditions attached to the agreement to repair or rectify the affected units.

MPL's inaction and the agreement — its effect on the demolition order

[143] Following the issuance of the demolition notice, and there being no application for approval to reinstate the affected units, MPL should have taken steps either to ensure that the units were in fact demolished or else proper approvals were applied for and plans duly submitted by the party undertaking the repair works. Whilst it is may be true that MPL had never withdrawn the demolition notice nor had it received any application for approval to carry out the reinstatement works, the court is of the view that they cannot claim that they were unaware of or at all that reinstatement works were in fact being carried out. By their silence and inaction, they may have given an impression that the reinstatement works were in fact either approved or else condoned. The court notes the use of the words 'kecuali setelah cadangan kerja baikpulih dipersetujui oleh semua pihak dan diperakui selamat oleh Jurutera Perunding yang bertauliah'. The court is faced with considerable difficulty in attempting to understand what is meant by MPL when it says it has never withdrawn the demolition notice and yet follows that with the words 'kecuali setelah ...'. In the circumstances, the court is prepared to accept that the correct position is this: whilst the demolition order is not withdrawn, nevertheless it was not proceeded with in that MPL did not demolish the affected units themselves nor did they impose any daily fine for failing to do so. In light of the evidence adduced as to the circumstances then prevailing at the material time, the court is prepared to accept that there was some form of informal stay of the demolition order. However, any agreement to reinstate must be with the consent of all parties and the reinstatement works must be certified as safe by a 'Jurutera Perunding yang bertauliah'. Had these stipulations been complied with, conceivably MPL would have considered revoking the demolition notice at some future time.

Disclosure of information and documents

[144] Throughout the hearing, the court was faced with the specter of the

plaintiffs' repeated requests to the defendant and their contractors for information and documents to no avail. The court notes the defendant's submissions that they were not obliged to accede to the plaintiffs' requests and that once the defendants had elected to reinstate, the repair works had to be completed to the reasonable satisfaction of the appointed architect and not the owners who cannot be subjective. Thus their argument is that the plaintiffs have no right to demand disclosure or to interfere in the repair works.

[145] The court notes the contention of the plaintiffs that the defendant is required to comply with the express and implied terms and conditions of the said policy as well as the agreed conditions as set out in the 25 February 2004 letter. The plaintiffs further claims that the defendant has a duty and responsibility under common law to disclose all information which is material in respect of the performance of the defendant's obligations. They rely on a paragraph appearing at p 304 of the book *The Commercial Law of Malaysia* by Wu Min Aun and Beatrix Vohrah in support of their submission that it is the duty of the insurer or its agent to disclose all material facts within their knowledge.

[146] The court finds that the plaintiffs' reliance on this particular passage in the afore-cited textbook would appear to be misplaced. There the authors were discussing the uberrimae fidei principle in insurance contracts where a party is under a duty to disclose all information that would influence his decision to enter into a contract, whether such information was requested or not. Failure to disclose material information would give the other party the right to avoid the contract. This duty to disclose extends to the insurer which is required to disclose all facts within its knowledge. However, this duty to disclose occurs *before* the conclusion of the contract.

[147] To properly understand and appreciate what was said by Wu Min Aun and Beatrix Vohrah, the court herewith reproduces the complete paragraph in question:

> It is often forgotten that the duty is equally demanded of the insurer. It is the duty of the insurer and his agent to disclose all material facts within their knowledge. Any representations made in the negotiations *leading to the contract* and which induces the insurer to enter into it must be true. (Emphasis added)

The court is of the view that this requirement for full disclosure of material facts takes place before and leading to the entering of the contract. In our instant case, the plaintiffs' complaints are in respect of a failure to disclose information long after the contract of insurance between the parties had been entered into.

[148] The court has also carefully examined the relevant clauses in the said policy to see if there was any provision requiring the insurer to furnish information and documents when a property is reinstated. The court notes that cl 16 of the policy reads, inter alia, as follows:

> 16 ...
>
> If the Company so elect to reinstate or replace any property the Insured shall, at his own expense, furnish the Company with such plans, specifications, measurements, quantities, and such other particulars as the Company may require, and no acts done, or caused to be done by the Company with a view to reinstatement shall be deemed an election by the Company to reinstate or replace.

[149] A reading of the above clause would tend to support the defendant's submission that whilst there was an obligation on the part of the insured, namely the plaintiffs, to furnish the insurers with such information and particulars as may be required, there was no corresponding obligation on the part of the defendant as insurers to do likewise.

[150] On this issue, the court finds that although it would have been infinitely wiser of the defendants and their contractors, engineers and agents to have provided the plaintiffs with whatever information that was asked for if only to allay their fears and concerns over the nature and quality of the repair works that was being undertaken on their properties, however, there was no legal requirement for the defendants to do so. As such, although the reluctance of the defendants to provide the information requested does appear puzzling and at times even suspicious, the court finds that the defendants were not in breach by refusing to provide the documentation requested for.

The retaining wall

[151] The insurance policy is clearly stated as covering not just the three blocks of four storey buildings but also the 'Outbuilding, *Wall* and Fencing'. A description of the coverage includes subsidence and landslip and removal of debris. Although DW2 had testified that the retaining wall was unsafe, he was unable to produce the core tests in support of his evidence, if indeed such tests were done. On the other hand, the plaintiffs through PW8 had established that the design, structural integrity and internal stability of the RC retaining wall were adequate. The conclusion was arrived at after core tests were carried out to test the strength of the original retaining wall. The court has no hesitation in accepting the evidence of PW8 which was based on both core tests as well as calculations that it was the excessive rise of the water table and continuous rainfall that had contributed to the landslide and caused the collapse of the retaining wall. As such, the court finds that any suggestion that the damage to

A the affected units was caused not by the landslide but by the failure of a below standard retaining wall is without basis and an attempt to avoid liability.

[152] As such, looking at the totality of all the evidence adduced, the court finds that the plaintiff has succeeded in proving on a balance of probabilities that the affected units owned by the plaintiffs were damaged during landslides on 13 September 2003 and 6 October 2003. The court finds that the damage caused to the affected units, which includes the damage to the retaining wall, was covered under the Master Policy No 03FPJ002862 issued by the defendant. The court finds although there was an agreement (of sorts) between the parties to reinstate the affected units without demolition, that agreement was subject to a host of conditions, not least of which was the requirement to comply with all relevant laws and regulations relating to the repair works. It is the court's finding that the defendants and their engineers and contractors were under a duty to comply strictly with the provisions of the SDBA 1974 as well as the UBB 1984.

[153] The court finds that there was clearly and admittedly no such compliance. In light of the fact that there is a demolition order hanging over the affected units, albeit 'suspended' since no actions appear to have been taken by MPL, the court is of the view that the specter of the demolition order places an even greater obligation on the defendant to strictly comply with the law which was specially enacted to cover just a situation of failure of building.

Were the repair works properly done?

[154] Much has been said by both parties as regards the nature of and the quality of the repair works. The plaintiffs contend that the defendant had deviated from the original plans by replacing the RC columns with steel H columns and that this would have an effect on the stability and integrity of the building. The court notes that cl 16 of the policy does not require the insurers to reinstate 'exactly or completely, but only as circumstances permit and in reasonably sufficient manner'. The court is therefore unmoved by the plaintiffs' complaint that the defendant had deviated from the original plans. What is necessary is for the plaintiffs to prove that in carrying out the repair or reinstatement works, the defendant or his agents and contractors had failed to comply with the directions of MPL in P11 and the conditions as were agreed between the parties.

[155] The court notes that whilst PW1 has complained about the use of steel H-columns with simple bolted end connections which he claims has altered the overall design concept of the whole building structure and affected the overall

building stability, the defendant's consulting engineer (DW2) argues that the use of H-beams where the reinforced steel content was higher would only make the structure stronger and better.

[156] The court is faced with conflicting testimony as regards the wisdom of using the H steel columns. Whilst it is true as submitted by the defendant that the building is still standing today, however it begs the question as no one knows if it will still be standing tomorrow. The court also notes the evidence of PW1 as regards the bolts used to secure the column to beam connections. PW1's evidence is that for each column end connection there was only one row of five 16mm diameter bolts and that this together with the rather short bolt anchor embedment depth as well as the short edge distance would result in the steel H-columns functioning simply to sustain vertical loads. Its capacity to sustain lateral loads or Torsional or twisting load on the edge beams and columns remains uncertain. The court has compared PW1's evidence on this score with the evidence of DW2 who contends otherwise. The court confesses to some concern that DW2's initial recommendation that the damage could be repaired and the building restored as expressed at a meeting on 18 February 2004 was not supported by any soil tests or core test results. The court expresses some reservations as regards the different aspects of the evidence of both the plaintiffs' as well as the defendant's consultant engineers in relation to the quality of the repair works. However, in the final analysis, the court finds that on a balance of probabilities the manner in which the repairs were carried out was not satisfactorily done and would give rise to valid and legitimate concerns as to the structural stability and safety of the affected units.

[157] Of material consideration is the fact that the defendant had admitted vide its letter dated 22 March 2004 (p 367) that they had appointed:

> Ir Cheah Chin Huat of CH Perunding and an architect (to be selected by IR Cheah) to supervise the repair works on the affected buildings (excluding the RC retaining wall) *and to certify the fitness of these buildings* (excluding the RC retaining wall) after the said repair works *including obtaining approval from the Town Council*.

[158] The court finds that the evidence adduced would show that Nathan-Jones Architect was only appointed after the repair works had been carried out for some two months. In fact, Parama Nathan ('DW1') had testified that she had no knowledge of the inherent strength of the structure of the affected units after the completion of the repair works as she was only certifying the cosmetic finishes. The court notes that the so-called certificate of practical completion dated 22 July 2004 is in fact entitled with the rider '(Architectural Finishes)' which shows that DW1's certification is only as regards the exterior finishes of the affected units.

[159] In light of the admission of DW1 that her certification is only as regards architectural finishes, the court views her *Pengesahan Kerja*, also dated 22 July 2004, to the effect that — 'kerja-kerja membaiki pulih unit-unit yang terbabit telah pun disempurnakan. Unit-unit tesebut telah pun dipulihkan kepada keadaan asalnya dan kami mengesahkan bahawa kerja-kerja tersebut telah diuruskan secara memuaskan' as only reflective of architectural and cosmetic finishes and not reflective of the structural stability of the affected units.

[160] The court further notes that no approval was ever obtained from MPL even though the defendant clearly envisaged in their letter dated 22 March 2004 that such approval would need to be obtained. There was thus obvious disregard for and non-compliance with the provisions of the SDBA 1974. Where planning approval had not been obtained and plans and specifications showing the proposed repairs had not been approved by MPL, the court is unable to accept that CH Perunding's certificate of practical completion dated 21 July 2004 (p 409) is valid or that it carried any weight whatsoever.

[161] As such, looking at the totality of all the evidence adduced, the court finds that the Plaintiff has succeeded in proving on a balance of probabilities that the affected units owned by the plaintiffs were damaged during landslides on 13 September 2003 and 6 October 2003. The court finds that the damage caused to the affected units, which included the damage to the retaining wall, was covered under the Master Policy No 03FPJ002862 issued by the defendant. The court finds although there was an agreement (of sorts) between the parties to reinstate the affected units without demolition, that agreement was subject to a host of conditions, not least of which was the requirement to comply with all relevant laws and regulations relating to the repair works. It is the court's finding that the defendants and their engineers and contractors were under a duty to comply strictly with the provisions of the SDBA 1974 as well as the UBB 1984.

[162] The court finds that there was clearly and admittedly no such compliance. In light of the fact that there is a demolition order hanging over the affected units, albeit 'suspended' since no action appears to have been taken by MPL, the court is of the view that the specter of the demolition order places an even greater obligation on the defendant to strictly comply with the law which was specially enacted to cover just a situation of failure of building. The court thus finds that the plaintiffs have succeeded in proving their case against the defendant on a balance of probabilities.

Claim for special damages

[163] What has the claimants claimed for in their statement of claim? In cl 32, the plaintiffs have claimed:

(a) special damages of RM1,647,921.20;

(b) liquidated damages of RM3,000 per day from 1 August 2004;

(c) as an alternative to (b), general damages to be assessed;

(d) interest and costs.

The claim for liquidated damages of RM3,000 per day has since been abandoned.

[164] The claim for special damages of RM1,647,921.20 is made up of the following:

(a) professional costs — RM25,000;

(b) for clearing the debris — RM75,521.25; and

(c) reinstatement costs of RM1,547,400.

[165] Learned counsel for the defendant has submitted that the claim for special damages has not been proved. Submissions centered on the claim for reinstatement costs which the defendant say has not been incurred. They argue that the plaintiffs had never proceeded with the repairs despite their allegation that the buildings were unstable and unsafe. They argue that nothing had been expended by them and therefore the claim for reinstatement is 'non-existent'.

[166] The defendant submits that although the first plaintiff had tendered two quotations dated 29 November 2003 from Ibec Sdn Bhd for RM1.5m (p 11 of encl 16) and Ng Enterprise for RM1,386,200 (p 13), no independent assessment was done to determine if the amounts were reasonable or accurate. The defendant raises a further point that the two quotations were both dated 29 November 2003, well before the repair works were carried out. He argues that the repairs had improved the buildings and therefore credit must be given for the betterment. Reliance was placed on the cases of *Reynolds and Anderson v Phoenix Assurance Co Ltd and others* [1978] 2 Lloyd's Rep 440 and *Chip Fong (Kuala Lumpur) Sdn Bhd & Ors v Guardian Royal Exchange Assurance (Malaysia) Sdn Bhd* [1992] 1 MLJ 598; [1991] 2 CLJ (Rep) 434.

[167] The court finds that the defendant's argument that an allowance must be made for betterment as the building had been repaired by them would well hold true if reinstatement without demolition was indeed an option. In light of the fact that the repair work was carried out contrary to the agreement between the parties and in blatant non-compliance with applicable laws, the court finds that the issue of an allowance for betterment does not arise.

[168] The plaintiffs have submitted that they had not rectified the affected units because they did not have enough funds to do so. Their claim for RM1,547,400 was for the reinstatement works. They argue that it cannot be

said the repair works carried out were adequate since to date there has been no certificate issued by MPL to certify that the building was fit for occupation. Emphasis was placed on the fact that no one is staying at the affected units.

[169] The court finds that the plaintiffs' claim for RM1,547,400 was made up of the lower quotation from Ng Enterprise amounting to RM1,386,200 plus a sum of RM60,000 for engaging a site supervision team and RM101,200 as professional fees. Has these items been proved by the plaintiffs?

[170] In answer 28 of his witness statement, PW2 had stated that its claim consultants had written to McLarens to submit documents in respect of the claims that they were making. These documents include the quotation from Ng Enterprise for the sum of RM1,386,200 (pp 33–356 of the agreed bundle). The plaintiffs submit that the quotation from Ng Enterprise was not disputed during the trial.

[171] The court notes that the quotation in question appears in Part A of the agreed bundle and as such it is agreed both on admissibility as well as contents. It is in light of the fact that the quotation was an agreed document that, on the instructions of the court, it was not marked as an exhibit.

[172] The defendant had elected not to cross-examine PW2 at all on the quotation by Ng Enterprise. Had they done so, PW2 would have had to defend the figures therein or else the plaintiffs would have been compelled to call Ng Choon Ping from Ng Enterprise in support of their case.

[173] It is the court's finding that where no cross-examination is made or at all in respect of a document appearing in Part A of the agreed bundle and such document had been referred to in the evidence of a witness, the said document stands as proved before the court. The court finds that since the defendant had chosen not to dispute the quotation or to cross-examine on it, it is the court's finding that Ng Enterprise had quoted a sum of RM1,386,200 as the costs for demolishing and reinstating the affected units. In the absence of cross-examination on this score, the court finds that the plaintiffs have succeeded in proving a sum of RM1,386,200 out of the RM1,547,400 that was claimed for reinstatement costs. No evidence has been adduced in respect of the sums of RM60,000 for engaging a site supervision team and RM101,200 as professional fees and the court thus finds these two heads of special damages not proved.

[174] As regards the RM75,521.25 claimed for clearing the debris, PW2 admitted that the only document relied on by him is the document at p 49 of bundle A. This document is a letter from the first plaintiff to McLarens itemising a total of 19 invoices for a total claim of RM75,521.25. 18 of these

invoices were described as for 'removal of soil/ earth' whereas the last invoice was for the supply of the concrete test block. Whilst it is true that this document appears in Part A of the agreed bundle, all it signifies here is that there is no dispute that such a letter was sent by the first plaintiff to the defendant. PW2 confesses that these 19 invoices were not before the court in support of his claim. The court is of the view that the existence of this document without more does not amount to proof that the said sums were in fact incurred. The court thus finds that the plaintiffs' claim for RM75,521.25 has not been made out.

[175] As regards the claim of RM25,000 for professional costs, DW2 describes it as the 'fees for engaging engineers to investigate the repair works for the Affected Units'. However, as pointed out by learned counsel for the defendant, there is nothing, not even a quotation, in support of this claim. The court has no hesitation in finding that this claim for special damages of RM 25,000 has not been proved.

CONCLUSION

[176] Based on the foregoing, the court finds that the plaintiffs have succeeded in making out their case against the defendant on a balance of probabilities. The court hereby allows the plaintiffs' claim for special damages in the sum of RM1,386,200 for the purpose of demolishing and reinstating the affected units, interests at the rate of 8% from the date of filing the suit until full settlement and costs. The court has not awarded any amount as general damages since no evidence has been adduced in this regard.

Plaintiffs' claim allowed with costs.

Reported by Kohila Nesan